89-1747



No. _____

In The

# Supreme Court of the United States

October Term, 1989

CARLISSA CHURCHILL, Informal Administrator Of The Estate Of Patrick Churchill, Deceased; And DALE CARLOUGH,

*Petitioners,*

vs.

The F/V FJORD, Her Engines, Tackle, Apparel, Appliances, Equipment, Apparatus And Furniture; WILLIAM McLINN, Owner And Operator Of Said F/V FJORD, And RUSSELL McLINN

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. MAY A VESSEL, POSSESSION OF WHICH WAS ENTRUSTED TO A CREWMAN AND BECAME INVOLVED IN A COLLISION, ESCAPE LIABILITY IN REM MERELY BECAUSE THE CREWMAN EXCEEDED HIS AUTHORITY IN HIS USE OF THE VESSEL?

II. DID THE COURT OF APPEALS ERR IN REFUSING TO REMAND THIS CASE TO THE DISTRICT COURT TO AFFORD PETITIONERS THE STATUTORY PRESUMPTION GRANTED THEM BY ALASKA LAW, AS 05.25.040, THAT ARISES FROM ENTRUSTING ONE'S WATERCRAFT TO AN IMMEDIATE FAMILY MEMBER WHEN THE COURT OF APPEALS DETERMINED IT WOULD NOT REACH THE LEGAL QUESTION OF THE INVALIDITY OF THE STATUTE?

## LIST OF PARTIES

Petitioners here are Carlissa Churchill, informal administrator of the Estate of Patrick Churchill, deceased, and Dale Carlough. Respondants are the seine fishing vessel FJORD, her engines, tackle, apparel, appliances, equipment, apparatus, and furniture, *in rem*, her owner William McLinn, and his son Russel McLinn, who was the crewman to whom the F/V FJORD and her equipment was entrusted, and who was operating her seine fishing skiff at the time of this accident.

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*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Carlissa Churchill and Dale Carlough pray for a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the

9th Circuit entered in the above-entitled proceedings on February 2, 1990.

## OPINIONS BELOW

The reported opinions of the Court of Appeals, are *Matter of McLinn*, 739 F.2d 1395, 1985 AMC 2408, (9th Cir., *en banc*, 1984), Apx. A; *Complaint of McLinn*, 744 F.2d 677, 1985 AMC 2339 (9th Cir., 1984), Apx. B; *Churchill v. F/V FJORD*, 857 F.2d 571 (9th Cir., 1988), Apx. C; and *Churchill v. F/V FJORD*, 892 F.2d 763 (9th Cir., 1988), Apx. D. The final decision of the court of appeals, entered February 2, 1990, denying reconsideration of its final amended opinion is unreported, Apx. E.

The opinions of the district court below are not reported. They are: the September 23, 1985, decision dismissing Petitioners' claims based on AS 05.25.040, against former defendants below, Johnsons, Apx. F; the November 15, 1985, decision denying Petitioners right to jury trial, Apx. G; the December 3, 1985, decision dismissing Petitioners' claims based on AS 05.25.040 against Respondant McLinns, Apx. H; the court's April 24, 1986, findings and conclusions Apx. I; the May 2, 1986, order amending findings and conclusions, Apx. J; the May 6, 1986, judgment Apx. K; and the June 17, 1986, order amending judgment, finding pursuant to FRCP 54(b), no just reason for delay of entry of partial final judgment and denying Petitioners' motion to amend findings, Apx. L.

## JURISDICTION

The amended judgment of the court of appeals was entered on December 18, 1989, *Churchill*, supra, 892 F.2d 763 (9th Cir., 1989), Apx. D; amending its earlier opinion, supra, 857 F.2d 571 (9th Cir., 1988), Apx. C. A petition for rehearing of the December 18, 1989, amended judgment was denied February 2, 1990, Apx. E; and this petition is filed within 90 days of that date. The jurisdiction of this court rests upon 28 USC § 1254(1).

## STATUTES INVOLVED

This case involves the application of and potential invalidity under federal paramount statutes and general maritime law of AS 05.25.040, Apx. R, p. 1, and the identical laws of eleven other states the text of which is contained in Apx. R. Statutes of states having similar provisions are contained in Apx. S.

## STATEMENT OF THE CASE

This is a suit seeking damages for the accidental death of Patrick Churchill, and serious head injuries and alleged brain damage to Dale Carlough, two passengers in a small salmon seine skiff, operated by Russel McLinn, which was equipage[1] to a larger seine fishing vessel, the

[1] Compare *Petition of White Cloud Inc.*, 813 F.2d 1513, 1516 (9th Cir., 1989; *In Re Ocean Fisheries Inc.*, 1931 AMC 381 (E.D. Va., 1930).

F/V FJORD, owned by Russel's father, William McLinn, and upon which Russel was a crewman. The skiff operated by Russel McLinn collided with another skiff operated by a David Panamaroff on June 30, 1979. Petitioners brought suit in U.S. District Court, for the District of Alaska, (A80-038), alleging negligence and unseaworthiness of the McLinns and their vessel, Panamaroff and of a third seine vessel's skiff (F/V SUPERSONIC) operated by Mike Chichenoff, and owned by Gilbert and Jack Johnson, upon which Chichenoff was employed as a crewman. See 744 F.2d 677, 680. Apx. B, pp. 3-5. This skiff was paralleling the Panamaroff skiff and Petitioners alleged its operator was partly responsible for the accident. See 744 F.2d 677, Apx. B.

In this action below Petitioners alleged the defendants' vessels were liable *in rem*, and that their owners as well as their operators were liable *in personam* under a number of theories, but as is relevant to this petition, AS 05.25.040.

Respondants William McLinn, in response to Petitioners' suit, brought a limitation action on behalf of the F/V FJORD including her equipage and posted bond in the amount of her alleged value. (a80-250 Civil). The Johnsons, on behalf of the F/V SUPERSONIC, did likewise, (a80-321 Civil). These cases were consolidated, but trial was stayed for several years following the dismissal of Chichenoff, Johnsons and the SUPERSONIC, which decision was eventually reversed, 744 F.2d 677, Apx. B. Following reversal, Johnsons, despite the language of *Complaint of McLinn*, supra, at 682, Apx. B, pp. 11-12, which appeared to address the matter, thereafter filed a

motion to declare AS 05.25.040 invalid, with which the district court agreed, Apx. F, pp. 8-13.

Respondant Russel McLinn then filed a similar motion as to Petitioners' claims to him, which was granted December 3, 1985, Apx. H, p. 4. Petitioners' case against Johnsons and the SUPERSONIC settled prior to trial.[2] The case then proceeded to trial absent the Petitioners' dismissed claims under AS 05.25.040.

The undisputed evidence at trial was that the skiff operated by Russel McLinn in the accident was the equipage of the F/V FJORD, necessary for her to seine during the upcoming purse seine fishery, and for use as a lighter or crew boat in connection with the seine vessel for a number of activities, some of which were purely recreational. Although the court of appeals, 892 F.2d 763, 767, Fn. 2, Apx. D, p. 6, Fn. 2, held the trial court never expressly found the McLinn skiff was "equipage" or an "appertenance", compare *White Cloud*, supra, the district court did find the skiff was used primarily as a "seine skiff in connection with the F/V FJORD". Apx. I, p. 3, Finding 6; and as noted by the court of appeals, supra, the district court did hold the Chichenoff skiff[3] was equipage,[4] and further noted there was no indication in the record that the district court did not consider the McLinn

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[2] Petitioners case against Panamaroff settled after trial pending the appeal to the 9th Circuit.

[3] Which the court of appeals had earlier found had been used for a similar purpose, 744 F.2d 677, 680, Apx. B, p. 4.

[4] The opinion of the district court is found in Apx. F, pp. 2-4.

skiff part of the FJORD's equipage. 892 F.2d 763, 767, Fn. 2, Apx. D, p. 6, Fn. 2.

It was equally undisputed at trial that prior to the accident the FJORD and her seine skiff were both in navigation, floating in the Kodiak small boat harbor, both together with the other FJORD fishing gear, having been readied for the upcoming salmon season. Deposition of William McLinn, Apx. N, p. 2. It was also undisputed that Russel McLinn was a crewman on the FJORD, and that in that capacity he had occasion to operate the skiff. Russel McLinn testimony, Apx. P, pp. 2-3; Borg's testimony, Apx. Q, pp. 9-13. And finally it is undisputed that after most of the ready work on the FJORD and her gear was done, William McLinn and the rest of the crew, except Russel McLinn, left Kodiak to fly home to the nearby city of Seward, Alaska, for the July 4th weekend, leaving his 18 year old son and crewman[5] Russel McLinn living on-board, and "in charge" of the seine vessel and all of her equipage, with the keys to both the seine vessel and the skiff in them. William McLinn, Inter. No. 3, Answer, Apx. M, p. 2; Russel McLinn deposition, Apx. O, p. 2; Borg testimony, Apx. Q, pp. 3-4; William McLinn testimony, Apx. Q, pp. 15-16.

What was in factual dispute at trial was Russel McLinn's authority to use the skiff. To read the opinion of the court of appeals, one is left with the impression that

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[5] A minor who lawfully could not drink under Alaska law, but which at least conflicting evidence supported his father knew to both drink and use marijuana, and to have a history of problems with juvenile authorities. See 892 F.2d 763, 771, Apx. D, pp. 15-16.

no evidence supported the Petitioners' version that Russel had authority to use the skiff. The court of appeals is correct that both William McLinn and Joe Borg, the F/V FJORD skiffman (and close friend of William McLinn); so testified at trial that before their departure from Kodiak they expressly told Russel McLinn not to use the skiff.[6] 892 F.2d 763, 768, Apx. D, pp. 7-8, 10. See also Borg testimony, Apx. Q, pp. 1-2. However, in a sworn recorded statement taken a week before trial, Borg had testified to the opposite, Apx. Q, pp. 5-11.

Russel McLinn on the other hand, testified at trial that he had no memory of the alleged prohibition described by his father and Borg. See Russel McLinn testimony, Apx. P, p. 2. At an earlier deposition he testified he had not been so told, Russell McLinn depo., Apx. O, p. 2. And even William McLinn testified that despite his alleged admonition, he foresaw circumstances that might arise in his absence whereby Russel might be authorized to use the skiff, (in the event of fire, to tow something away). Apx. Q, pp. 16-17. As noted by the court of appeals, 892 F.2d 763, 767, Apx. D, p. 8, following a trial the district court made no express finding on the issue of whether Russel McLinn had "lawful possession" of the skiff within the doctrine of the law of liability *in rem*, which that court held involved some degree of consent or authority to use the skiff, (discussed extensively as an erroneous view of the law, infra). The district court also

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[6] According to William McLinn he told Russel, "I see no reason for you to use the skiff". Apx. Q, pp. 14-16.

made no express finding on the issue of whether Russel McLinn had implied authority to use the skiff.[7]

The court of appeals nevertheless concluded that the evidence in the record supported an "implicit finding" that Russel McLinn was not in "lawful possession" of the skiff, and that he had no consent, express or implied, to use it, 892 F.2d 763, 769, Apx. D, pp. 8-9.

While Petitioners thoroughly reject these conclusions by the court of appeals,[8] they will accept for purposes of this petition that these "implicit findings" were made by the district court, as their existence does not alter the legal outcome of the matter.

The district court did enter express findings that establish Russel McLinn used the FJORD skiff to transport himself and others to a beach party on a nearby island, where he consumed intoxicating liquor and marijuana. Russel McLinn then headed back to Kodiak at night, at high speed, through a narrow passage, where he

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[7] See Findings, Apx. I. The trial court did find there had been no "negligent" entrustment under the doctrine of negligent entrustment. Apx. I, p. 4, Finding 16; but it simply never addressed whether there had been an entrustment or whether Russel McLinn had consent.

[8] And ask that if it grant certiorari, on other issues, this court proceed to correct this error as the district court did not make such findings, and if relevant to the outcome, remand this matter to the district court to expressly address these issues. The federal rules and the decisions of this court make no provision for "implicit findings". And a review of the district court's decision, Apx. I, leads in no fashion to the clear conclusion that it found Russel McLinn was unauthorized to use the skiff under the conflicting evidence.

collided with the Panamaroff skiff being operated by an intoxicated Mr. Panamaroff. Apx. I, pp. 2, 4, Findings 1, 2, 15.

The district court apportioned liability for the accident between Russel McLinn, Panamaroff, and the Petitioners, (whom the district court found comparatively negligent); Apx. I, p. 5, Findings 18-24, but exonerated both the F/V FJORD and her equipage *in rem* and her owner William McLinn. Apx. I, p. 4, Findings 16-17, p. 6, Conclusion 6-7.

Petitioner appealed this decision to the 9th Circuit Court of Appeals, which originally upheld the district court in an opinion at 857 F.2d 571 (9th Cir., 1988) Apx. C, and of specific relevance to this court declared invalid Alaska's vessel owner responsibility statute,[9] AS 05.25.040, as repugnant to the general maritime law, 857 F.2d 571, 575-576, Apx. C, pp. 9-12. This declaration of the invalidity of a state statute would have given Petitioners a direct appeal to this court, 28 USC § 1254(2).

Upon pointing out to the court of appeals on reconsideration that AS 05.25.040 was not only not necessarily in conflict with maritime law, but in fact this legislation was mandated by Congress in the Coordinated National Boating Safety Act of 1971, 46 USCA § 1475(a)(2), see *Recreational Boating Safety* hearings before the subcommittee on Coast Guard, Coast and Geoditic Survey, and Navigation of the Committee on Merchant Marine and

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[9] Taken from the Uniform Model State Boating Statute, which at least eleven other states have adopted verbatim. Apx. R-S.

Fisheries, House of Representatives, 91st Congress, 2nd Session on HR 15041, HR 15140. Bills to Provide for a Coordinated National Boating Safety Program Serial No. 91-30, pp. 20, 46, 57-58, 60, 61-63, 83-87, 90, 113-114, 118, 181, 200, 207, 209, 219-220, 370, 399-400, and 473; the court of appeals did reconsider but in doing so, committed other errors in reciting alternate grounds, which the court of appeals suggested supported the trial court's decision. December 18, 1989, 892 F.2d 763, Apx. D.

Following a petition for reconsideration of this December 18, 1989, amended decision, reconsideration was denied, Apx. E, and this petition for certiorari follows.

## REASONS FOR GRANTING THE WRIT

### I. THE 9th CIRCUIT COURT OF APPEALS' DECISION HOLDING THAT A VESSEL, THE POSSESSION OF WHICH HAS UNDISPUTEDLY ENTRUSTED TO A CREWMAN, IS NOT LIABLE IN REM WHEN THAT CREWMAN EXCEEDS HIS AUTHORITY TO USE THE VESSEL, AND INVOLVES IT IN A COLLISION, DECIDES A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT, AND OTHER CIRCUITS.

Without the semblance of support in the decisional law of this court, the other circuits, or Congress, the 9th Circuit embarks upon a new course for the ancient, well-settled law of liability *in rem* of this country which was first clearly enunciated by this court in *The China*, 74 US (7 Wall) 83, 19 L.Ed. 67 (1868), and most recently repeated

in *The Barnstable*, 181 US 464, 21 S.Ct. 684 (1901), wherein this court stated:

> "The law in this country is entirely well settled that the ship itself is to be treated in some sense as a principle and as personally liable for the negligence of anyone who is lawfully in possession of her, whether as owner or charterer."
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> "The thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing and this whether the offense be *malum prohibitum* or *malum in se*.
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> "That the act makes no exception whatsoever, whether the aggression be with or without the cooperation of the owner.
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> "It is not an uncommon course in the admiralty, acting under the law of nations to treat the vessel in which or by which or by the master *or crew thereof a wrong or offense has been done, as the offender, without regard whatsoever to the personal misconduct or personal responsibility of the owner thereof.*"
>
> (emphasis added); 181 US 464, 467-68, 21 S.Ct. 684, 45 L.Ed. 954, 957 (1901).

This basic principle of law has been reiterated modernly by *Amoco Oil v. M/V Monte Clair*, 766 F.2d 473 (11th Cir., 1985), cert den ___ US ___, 106 S.Ct. 1639, ___ L.Ed.2d ___ (1986); *Cavcor Co. v. M/V Suzdel*, 723 F.2d 1096 (3rd Cir., 1983); and even a different panel of the 9th Circuit in this case, discussing the potential liability of the F/V

SUPERSONIC with whom petitioners reached a settlement before trial. *Complaint of McLinn*, 744 F.2d 677, 684 (9th Cir., 1984); see also *California v. Italian Motorship Ilice*, 534 F.2d 836, 841 (9th Cir., 1976).

As stated in *The China*, 74 US (7 Wall) 53, 19 L.Ed. 67, 73, the liability of the vessel *in rem:*

> "is not derived from the civil law of master and servant, nor from the common law. It had its sources in the commercial usages and jurisprudence of the middle ages."

*The China* goes on to discuss the basis and social policy behind the law, and concludes that if vessels are not subject to the maritime lien, the victim's cause of action against her operator would be illusory. *Cavcor*, supra, 1101. And this principle clearly holds true in this case if the 9th Circuit's opinion is upheld. In that case these victims of serious injury and death with a clear case of negligence, are left to recover against an impicunious uninsured youth, whom the FJORD's vessel owner nevertheless knowingly placed in charge of his commercial enterprise.

And there perhaps explains the ancient basis for the rule, the concept of a vessel as a commercial enterprise is inherent in the maritime law. The vessel historically throughout the world in marine law has been treated to the protections of an ancient form of limited liability, which is embodied in American law in 46 USCA § 183 et seq. See Gilmore & Black, *Law of Admiralty*, 2nd, (1979), § 9-18a. However, along with limited liability also comes the concept of strict vicarious liability *in rem* for the torts of whomsoever has possession of the vessel, but only up

to the amount of the value of the enterprise. See *The Main v. Williams*, 152 US 122, 131 (1894).

Respondents may wish to cite that a critic of the rules of *in rem* liability was none other than the eminent Oliver Wendel Holmes in *The Western Maid*, 257 US 419 (1922); *The Eugene F. Moran*, 212 US 466, 474 (1909), and *Liverpool, Brazil & River Plate Steam Navigation Company v. Brooklyn Eastern District Terminal*, 251 US 48, 40 S.Ct. 66 (1919). However as the eminent modern authorities Gilmore & Black, supra, pp. 606-607, point out, Holmes was contemporaneously criticized by a great admiralty judge in the Harvard Law Review, Hough, *Admiralty Jurisdiction – Of Late Years*, 37 Harv. L.Rev. 529, 543 (1924), for these opinions, and Gilmore & Black, supra, § 9-12, pp. 606-607, modernly criticize him for using "magnificent rhetoric" to justify a result. Holmes was a great jurist, but no champion of the concept of vicarious liability. And he also failed to recognize the concept of total limited liability under the Limitation Act, that goes hand in hand with strict liability *in rem*. His arguments failed to change this basic principle of general maritime common law in this country then, and they should not now.

Since these cases, this court has repeatedly discussed the *in rem* liability law of this country without criticism. See *Italian Motorship Ilice*, supra, at 842, citing cases.

In applying this principle, the leading admiralty authorities Gilmore & Black, supra, at p. 601, also note the concept is not totally unlimited, the vessel is only liable *in rem* for the acts of someone who has lawful possession of her. "Lawful possession" means that mutineers, pirates and the like are excluded. But conversely as succinctly

stated by Griffin, *The American Law of Collision*, (1949), § 244, p. 554.

> "since the vessel is regarded as the wrongdoer, the fact that the wrongful acts were done without the authority, *or even contrary to orders of the ship's owners*, it makes no difference in the liability of the vessel." (emphasis added).

Applying this established legal principle, as it should be, courts have gone so far as to hold the vessel responsible *in rem* when her master diverted a cargo of relief bound for Pakistan to her enemy India. *United Nations Childrens Fund v. S/S Nordstern*, 251 F.Supp. 833 (S.D., N.Y., 1965); see also, *Cavcor Co.*, supra, *Logue v. Stevedoring Corp. v. The Dalzellance*, 198 F.2d 369 (2nd Cir., 1952); and *United States v. Helen*, 164 F.2d 111 (2nd Cir., 1947).

Nevertheless, without the re-examination of the "settled law" of this country most recently reaffirmed in *The Barnstable*, supra, by this court, or without even so much as a hint in dicta from this court to suggest a change in law to the contrary, or even a suggestion by learned jurists in other circuits or district courts, the 9th Circuit sets the law of liability *in rem* on unchartered seas, by engrafting it with what amounts to the concept of a respondiate superior "scope of employment" limitation, in holding that because crewman Russel McLinn used the vessel's skiff contrary to orders, or said another way, that though he had "possession" of the vessel, he was not authorized to operate her (except in unforeseeable emergencies), the vessel is not responsible *in rem*, the owner has not even a responsibility limited to the amount of his investment and the victims of a collision with this vessel have no meaningful vehicle for recovery.

This course has extremely broad social implications for the maritime industry because what the 9th Circuit has held is that wheresoever a crewman disobeys orders, there is no vicarious liability, even *in rem*. While for purposes of this argument Petitioners may concede here that Russel McLinn's conduct if he was expressly so commanded to refrain from using the skiff may border on a flagrant breach of duty, (particularly where he negligently proceeds to drink and smoke marijuana while using the vessel), however, Petitioners ask how is this any different than the master of the EXXON VALDEZ (who has been arguably drinking) turning over the helm to an unlicensed third mate in inland waters, despite a statute and posted standing company order that he is never to do so?

Russel McLinn, however disobedient, was an undisputed crewman of the vessel, on his vessel with duties which at times required him to operate the skiff;[10] he was not a mutineer, pirate or thief. No criminal charges were brought against him; (he did not even lose his job after the accident). This crewman did not have to break a lock or even find a secreted key to use this skiff. He had possession of it, and only a (disputed) command from his

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[10] Noticably when questioned if there was any circumstance in which the owner conceived his crewman/son might be authorized to use the skiff, in the face of his alleged orders to the contrary, he replied, if there was a fire, he might want to tow something away, (Apx. Q, pp. 16-17, referring presumably to saving his seine vessel or some other piece of equipment). In short this vessel owner wanted the economic benefit of his crewman's presence, but not the economic liabilities he might create.

father prevented its use. Russel McLinn was no more than a reckless, disobedient son, whom his father had hired as a crewmember.

The master and third mate of the EXXON VALDEZ stood in no different posture. Should Exxon's liability be any less if Captain Hazelwood had brought a few buddies back from a Valdez bar at which he was drinking, and they decided to use the EXXON VALDEZ to cruise the harbor? What if they only used her launch?

Hired help will disobey, despite the most well intended orders. Given the predisposition of seamen, compare *Boudoin v. Lykes Bros. SS Co.*, 348 US 336, 75 S.Ct., 382, 99 L.Ed. 354 (1955), this result is even more predictable. If the 9th Circuit's opinion in this case is allowed to become law, all vessel owners from the diminutive FJORD to the supertanker will have grounds to escape liability whenever a master or crewman disobeys an order. If the orders for the operation of the vessel are then carefully drafted, no responsible party will be liable. At the very least, no liability will attach whenever an unauthorized crewman such as the EXXON VALDEZ' third mate takes it upon himself to take the vessel's helm.

This is a radical change of *in rem* liability law. This case cannot be limited to its facts. On the contrary, even if an express prohibition against the use of the skiff was stated, as this vessel owner left the vessel, the crewman in question was the vessel owner's minor son (whom he knew drank and smoked marijuana), whom he left in charge of the vessel and skiff over the July 4th weekend while the rest of the crew flew to another city. If anything, this owner had more culpability for the disobedience

than he might have had had he left it with a trusted hired hand. But trusted or not, the law of *in rem* liability is that the vessel is liable.

This court should reverse the 9th Circuit's course and set it straight upon the ancient, well charted passage. Liability *in rem* for all acts of persons lawfully in possession of a vessel may be old law, but it is good law. It should not be bent to achieve a result or sustain a decision. The shoals the 9th Circuit course passes are simply too numerous and too treacherous.

## II. THE 9TH CIRCUIT COURT OF APPEALS ERRED IN REFUSING TO REMAND THIS CASE TO THE DISTRICT COURT TO AFFORD PETITIONERS THE STATUTORY PRESUMPTION GRANTED THEM BY ALASKA LAW, AS 05.25.040, THAT ARISES FROM ENTRUSTING ONE'S WATERCRAFT TO AN IMMEDIATE FAMILY MEMBER WHEN THE COURT OF APPEALS DETERMINED IT WOULD NOT REACH THE LEGAL QUESTION OF THE INVALIDITY OF THE STATUTE

This issue most properly constitutes a claim of far departure from the accepted and usual course of judicial proceedings pursuant to Supreme Court Rule 17.1(a).

Simply put, AS 05.25.040, Apx. R, p. 1, establishes a presumption that if a "watercraft"[11] is used under the

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[11] Which the court of appeals held the skiff being operated by Russel McLinn was, within the meaning of this statute 744 F.2d 677, 682-683, Apx. B, pp. 9-12, 892 F.2d 763, 768 Apx. D, pp. 9-10.

control of the owner's son, its use is presumed to be with the knowledge and consent of the owner. It is undisputed Russel McLinn was operating the skiff at the time of the accident, and that he was the owner William McLinn's son.

This statutory presumption is one of state law, respecting a fact which is an element of a claim to which state law supplies the rule of decision, and therefore its effect is determined by state law. Federal Evidence Rule 302. And in Alaska, the effect of a presumption is determined by Alaska Evidence Rule 301(a), which provides:

> Rule 301: *Presumption in General in Civil Actions and Proceedings*
>
> (a) *Effect.* In all civil actions and proceedings when not otherwise provided for by statute, by judicial decision or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast. The burden of going forward is satisfied by the introduction of evidence sufficient to permit reasonable minds to conclude that the presumed fact does not exist. If the party against whom a presumption operates fails to meet the burden of producing evidence, the presumed fact shall be deemed proved, and the court shall instruct the jury accordingly. When the burden of producing evidence to meet a presumption is satisfied, the court must instruct the jury that it may, but is not required to, infer the existence of the presumed fact from the proved fact, but no mention

> of the word "presumption" may be made to the jury.

The meaning of the language is clear, as confirmed by the Alaska Evidence Rules Commentary to Rule 301, Alaska Rules of Court 1989-1990, Main Edition (1989), pp. 348-349. The Alaska Rules of Evidence adopt an intermediate position between the famous Morgan-McCormick theory and the Thayer-Wigmore theory on the effect to be given a presumption. Alaska Rules of Evidence 301(a) provides that the statutory presumption remains in the case as evidence from which the trier of fact "may, but need not, infer the existance of the presumed fact from the proved fact". As the Alaska Rules Commentary concludes:

> "No good reason appears why a presumption that is powerful enough to shift the burden of persuasion should disappear entirely when shifting is impossible." Id.

The court of appeals in its final opinion also recognized this statutory presumption, 892 F.2d 763, 769, Apx. D, p. 10.

However, because the district court declared AS 05.25.040 invalid as repugnant to federal maritime law and the limitation of liability act, 46 USCA §183, Apx. F, pp. 8-13, Apx. H, p. 4, the district court of necessity could not have applied this presumption is reaching its "implied finding" (as described by the court of appeals), that Russel McLinn had no express or implied consent to use the skiff. See also the absence of any mention of this presumption (or a finding that Russel McLinn had no consent) in the district court's findings of fact and conclusions of law. Apx. I. Accordingly it is impossible that

Petitioners had the benefit of this presumption either to carry his burden of going forward, or his ultimate burden of persuasion with the trier of fact.

While the error in the failure to apply the presumption to carry Petitioners' burden of going forward could be said to be harmless in as much as Petitioners did nevertheless have evidence to carry that burden in Bogg's prior inconsistent statement Ex. Q, pp. 7-10, (although even that cannot truly be said in the absence of a finding or explanation by the district court as to how it reached its "implicit finding" which the court of appeals inferred). It cannot be remotely said to be harmless on the issue of Petitioners' ultimate burden of persuasion.

Russel McLinn, the operator of the skiff involved in this collision, was its owner's William McLinn's son. Absent AS 05.25.040, this fact says nothing about whether Russel McLinn had his father's express or implied consent to use the skiff. But if that statute is not invalid, (an issue which the court of appeals avoided, discussed infra), then this presumption must be considered along with all the other evidence, and from it (together with the other evidence in the case), the trier of fact may, but is not required, to infer the existence of the presumed facts. Alaska Rules of Evidence 301(a).

This could occur here in at least two obvious ways. First, given the permissive presumption, the nature of the family relationship, the fact that Russel McLinn was a young man without assets, and that his friend had assets and hence a lot to lose, and that the sole corroborating witness (Borg) was the father's friend and that Borg had just the week before trial given a totally contrary

recorded statement under oath, Apx. Q, pp. 7-10, the district court could have decided that on balance William McLinn's claim that he told Russel not to use the skiff did not preponderate. Alternatively the district court could have found the William McLinn claim, that he told his son not to use the skiff, did preponderate. But that inasmuch as Russel was William McLinn's son, the alleged statement may not have been intended, or understood that Russel absolutely had no authority to use the skiff.[12]

The court of appeals' resolution to this issue appears to have been simply to balance the evidence including the presumption itself, and conclude that William McLinn neither expressly nor impliedly consented to Russel's use of the skiff. 892 F.2d 763, 769, Apx. D, p. 10.

Even in this balance the court of appeals further erred in concluding that it was necessary that he consent to use of the skiff for "recreational pursuits", 892 F.2d 763, 769, Apx. D, p. 10. However, AS 05.25.040 has no such limitation; it merely requires the owner's consent to the operator's use in any capacity (i.e., "unless the watercraft is used with the owner's express or implied consent."[13]

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[12] As described by William McLinn: "I see no reason for you to use the skiff", is not a literal prohibition, and William McLinn testified that he could foresee situations in his absence occurring in which Russel would be authorized to use the skiff. Apx. Q, pp. 15-17.

[13] Were the 9th Circuit's interpretation to prevail, the statute would effectively be meaningless. Few owners would ever consent to the use of their watercraft negligently (and if they did, the owner would presumably be directly liable).

However, the real error of the 9th Circuit is in balancing the evidence at all. Simply put, the initial "balance" was not the 9th Circuit Court of Appeals' to make.

Whether the district court made an implicit finding of no consent (as the 9th Circuit ruled), or whether it made no finding at all, when the 9th Circuit ruled it would not reach the issue of the invalidity of AS 05.25.040, (actuating its statutory presumption), the only proper remedy for the 9th Circuit was to remand the case to the trier of fact to reconsider its "implicit finding" or lack thereof in light of the new "evidence" of AS 05.25.040's permissive presumption. This conclusion axiomatically follows from the relative functions of the court of appeals and the district court as enunciated first in *United States v. United States Gypsum Co.*, 333 US 64, 95, 92 L.Ed. 746, 766 (1948), and most recently in *Anderson v. Bessemer City*, 470 US 564, 571, 84 L.Ed.2d 518, 527, 105 S.Ct. 1504 (1985). See also, *McAllister v. United States*, 348 US 19, 20, 99 L.Ed. 20, 24, 75 S.Ct. 6 (1954); *Icicle Seafoods Inc. v. Worthington*, 475 US 709, 89 L.Ed.2d 739, 106 S.Ct. 1527 (1986). The balancing of evidence and its concommitment assessment of credibility is a task entrusted in the first instance to the district court. The court of appeals has no right to substitute its judgment for the district court's unless it finds the district court's judgment is "clearly erroneous". If that is true, it at least follows that where the court of appeals rules that the district court

failed to consider relevant "evidence", or here a presumption which remains in the case and from which the trier of fact may infer an ultimate fact, that then, the court of appeals may not affirm a result below absent a remand for that balance to be made by the appropriate trier of fact. At least that must be the result in the absence of a conclusion by the court of appeals that any other finding by the district court would be clearly erroneous. The court of appeals below did not so conclude, nor could it in the face of the substantial evidence to support the opposite conclusion just described. The only proper result was a remand.[14]

For purposes of this petition for certiorari, Petitioners have assumed that in light of the alternative route chosen by the 9th Circuit on reconsideration to defer ruling on the invalidity of AS 05.25.040, (the effect of which is to invalidate the Uniform Boating Safety Act which at least eleven other states have adopted verbatim and three others have adopted in slightly different form), this court would likewise choose to defer addressing this issue until this case was decided by the district court on its merits in Petitioners' favor on remand. Such a holding would be in keeping with the strong policy for this court to avoid a

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[14] The 9th Circuit also recognized this result in its final written opinion at 892 F.2d 763, 769 Apx. D, pp. 10-12, wherein it concluded that in light of its decision to address petitioners' claims on the merits it must also address their claim as to a right to a jury trial. If there was no conflict of fact such that a jury (or judge) could find for Petitioners, this issue would be moot. The 9th Circuit addressed the issue of Petitioners' entitlement to a jury in tacit recognition that the issue was not moot, because a question of fact existed.

state/federal conflict on the important question of the validity of a state statute when it may never be reached depending upon the course of the remand. Nevertheless at the risk of addressing an issue which this court could find dispositive, Petitioners will state in brief summary, that this model statute has been addressed by numerous courts,[15] all almost of which assumed the statute to be valid.

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[15] An identical provision of Louisiana law was applied to navigable waters in *Kaiser v. Travelers Ins. Co.*, 359 F.Supp. 90 (F.D. La., 1973), aff'd. 487 F.2d 1300 (5th Cir., 1974); Reh. granted on other issues, 496 F.2d 531 (5th Cir., 1984); *Radcliff v. U.S. Automobile Ass'n.*, 180 So.2d 58 (La., 1965); see also, *Stirrup v. Reiss*, 410 So.2d 537 (Fla., App., 1982); *Holman v. Reliance Ins. Co.*, 414 So.2d 1298, 35 ALR 4th, 81 (1982); and most recently, in *Martell v. Boardwalk Enterprises Inc.*, 748 F.2d 740, 749 (2nd Cir., 1984); Its validity was upheld against claims of federal supremecy in *Standsbury v. Hover*, 366 So.2d 918 La. App., 1979). See also, *St. Hilaire Moye v. Henderson*, 364 F.Supp. 1286 aff'd. 496 F.2d 973 (8th Cir., 1974), *cert den* 419 US 884, 95 S.Ct. 151, 42 L.Ed.2d 125; and *Adams v. Montana Power Co.*, 528 F.2d 437 (9th Cir., 1975). Any authority to the contrary, CR *Blevens v. Sfetk*, 66 Cal. Rptr. 486 (1968), has been resoundingly criticized. *Mittelman v. Seifert*, 94 Cal. Rptr. 654, 662 (Cal. App., 1971), and can undoubtedly be distinguished as predating *Moragne v. State Marine Lines Inc.*, 398 US 375, 26 L.Ed.2d 339 (1970); and *Askew v. American Waterway Operators Inc.*, 411 US 325, 36 L.Ed.2d 280 (1973); see *Montgomery v. Harrold*, 473 F.Supp. 61 (E.D. Mich., 1979). Compare, *Oppen v. Aetna Ins. Co.*, 485 F.2d 252 (9th Cir., 1973); *Gulf Offshore Co. v. Mobile Corp.*, 453 US 474, 69 L.Ed.2d 784, 101 S.Ct. 2870 (1981); *Maryland Casualty Co. v. Cushing*, 347 US 409, 74 S.Ct. 608 (1954); see also, Prosser, *Law of Torts* 4th, (1971) 468-488. But see, contra, *Branch v. Schumann*, 445 F.2d 175 (5th Cir., 1971); *Miami Valley Broadcasting Corp. v. Lang*, 429 So.2d 1333 (Fla. App., 4 Dist., 1983) reh den 444 So.2d 417 (Fla. S.Ct., 1984).

Moreover the issue of the statute's invalidity vis-a-vie general maritime law and the Limitation Act, 46 USCA §183 et seq., was expressly discussed in testimony before Congress[16] in hearings on the Coordinated National Boating Safety Act of 1971. Nevertheless, that Act, which requires the states to adopt the Model State Boating Act, as a condition to receiving federal funds for boating safety, passed without debate or amendment.

However Petitioners would note that an affirmative resolution of this statute's validity, would resolve a very

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[16] Recreational Boating Safety hearings supra, pp. 221-222, testimony by Stephen F. Chadwick Jr., of the Interclub Ass'n. of Washington, stated:

"There are other points of distinct interest. One that I do not attempt to explore is one of liability and what effect the Model Boating Act would have on the liability of a boating operator.

"We have admiralty lawyers who specialize in this area, and I would be very interested in their commentary. I called one friend on that subject, as an example, who has a firm that specializes in that way in Seattle, and he confessed to never having examined the Model State Boating Act.

"But there are a number of distinct principles that apply to marine accidents, limitation of liability, and things of that sort.

"I notice that the Model State Boating Act would make us our family's keeper. It would presume that the person in control, if related to the owner of the vessel, had permissive use, and that the owner was therefore responsible.

"Whether this is merely an evidentialy presumption, or whether it is an irrebuttable presumption, I don't know, but I would like to have the opinion of an admiralty man on that point before we were obliged to verbatim adopt the Model State Boating Act on that score."

serious growing debate as to the applicability of the Limitation Act, 46 USCA §183 et seq., to pleasure boats at all.[17]

## CONCLUSION

In upholding the district court's decision, the 9th Circuit committed two basic errors. First, it misapplied a basic ancient principle of federal maritime common law as to the liability of a vessel *in rem* for the torts of whomsoever has lawful possession of her. And second, in what would appear to be a result oriented decision, when the probable validity of AS 05.25.040 was pointed out to the 9th Circuit on reconsideration, it then misapplied basic federal appellate review procedure, and took it upon itself to weigh a statutory presumption (which the district court did not consider having found the statute invalid) along with the other evidence in the case and reached its own findings, rather than remand the matter to the proper finder of fact, to resolve the conflicting evidence, from its superior position of having heard and seen the witnesses, in light of this statutory presumption.

This court should therefore grant this petition for certiorari, review the decisions of the 9th circuit court of appeals below, and reverse the decisions of the court of

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[17] *Baldassano v. Larson*, 580 F.Supp. 415 (D.Minn., 1984); *Gibboney v. Wright*, 517 F.2d 1054, 1057 (5th Cir., 1975); *Richards v. Blake Builders Supply Inc.*, 528 F.2d 745, 748 (4th Cir., 1975); *Complaint of Tracey*, 608 F.Supp. 520 (W.D. Mich., 1986); *Complaint of Shaw*, 668 F.Supp. 524 (S.D. W.Va., 1987); *Estate of Lewis*, 683 F. Supp. 217 (N.D. Cal., 1987).

appeals denying Petitioners *in rem* liability against the F/V FJORD and her gear, and denying Petitioners a remand to the district court to consider the conflicting evidence of William McLinn's liability in light of the statutory presumption found in AS 05.25.040.

Respectfully Submitted this 2 day of May, 1990.

GERALD W. MARKHAM
*Attorney for Petitioners*

## APPENDIX A

**In The Matter of the Complaint of William McLINN, as Owner of the F/V FJORD, etc.**

**In the Matter of the Complaint of Gilbert Jack JOHNSON and Jack Stewart Johnson, as owners of the F/V SUPERSONIC, etc.**

**Frank CHURCHILL, as the Informal Administrator of the Estate of Patrick Churchill, and Dale Carlough, Plaintiffs-Appellants,**

v.

**The F/V FJORD etc., et al., Defendants,**

**and**

**The F/V SUPERSONIC, her engines, tackle, apparel, appliances, equipment, apparatus and furniture; Gilbert Johnson, part owner and/or operator of said F/V SUPERSONIC; Jack Johnson, part owner of said F/V SUPERSONIC, Defendants-Appellees.**

**No. 82-3644.**

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted En Banc
Feb. 15, 1984.

Decided Aug. 7, 1984.

A personal injury and wrongful death action was arising out of the navigation of three vessels two of which collided. The United States District Court for the District of Alaska, James A. von der Heydt, Chief Judge, held that an Alaska statute did not apply to the circumstances of the case. Appeal was taken. The three-judge panel requested en banc review. The Court of Appeals, Hug,

Circuit Judge, held that questions of state law are reviewable under the same independent de novo standard as are questions of federal law.

Remanded to original panel.

Schroeder, Circuit Judge, dissented with an opinion in which Browning, Chief Judge, and J. Blaine Anderson, Tang and Ferguson, Circuit Judges, joined.

Gerald W. Markham, Kodiak, Alaska for plaintiffs-appellants.

Kenneth F. Brittain, James M. Powell, Hughes, Thorsnes, Gantz & Powell, Anchorage, Alaska, for defendants-appellees.

Appeal from the United States District Court for the District of Alaska.

Before BROWNING, Chief Judge, WALLACE, J. BLAINE ANDERSON, HUG, TANG, SCHROEDER, FLETCHER, PREGERSON, FERGUSON, NELSON, and REINHARDT, Circuit Judges.

HUG, Circuit Judge:

This is an admiralty case in which a key issue is an interpretation of state law. We took this case en banc, at the request of the three-judge panel that initially heard this case, to decide whether we should accord special deference to a district judge's interpretation of state law or whether we should review such determinations under the independent de novo standard that we apply to a district judge's interpretation of federal law.

This case involves a personal injury action and a wrongful death action arising out of the navigation of

three skiffs, two of which collided off Kodiak Island, Alaska. As a part of that action, the plaintiffs asserted an *in personam* liability claim against two of the defendants based upon an Alaska statute. The interpretation of this statute is the issue of state law that presently concerns us. There has been no definitive interpretation by the Alaska Supreme Court. The district judge held that the statute did not apply to the circumstances of this case. The three-judge appellate panel of this court unanimously requested en banc review because they found the standard of review to be controlling. The panel indicated that if the question of law were reviewed under the deferential standard that we have applied in the past, which permits reversal only for clear error, then they would affirm; but if they were to review the determination under an independent de novo standard, they would reverse.

Generaliy in the past we have applied a deferential standard of review to a district judge's construction of the law of the state in which he or she sits, accepting that construction unless it is "clearly wrong." *Jablonski By Pauls v. United States*, 712 F.2d 391, 397 (9th Cir.1983); *Fleury v. Harper & Row, Publishers, Inc.*, 698 F.2d 1022, 1026 (9th Cir.), *cert. denied*, ___ U.S. ___, 104 S.Ct. 149, 78 L.Ed.2d 139 (1983); *Airlift International, Inc. v. McDonnell Douglas Corp.*, 685 F.2d 267, 269 (9th Cir. 1982); *Camacho v. Civil Service Commission*, 666 F.2d 1257, 1262 (9th Cir.1982); *Gaines v. Haughton*, 645 F.2d 761, 770 (9th Cir.1981), *cert. denied*, 454 U.S. 1145, 102 S.Ct. 1006, 71 L.Ed.2d 297 (1982).[1] today we adopt as the law of the

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[1] Two of our recent cases indicate some departure from the "clear error" standard. *See Insurance Company of North America*

(Continued on following page)

circuit the rule that questions of state law are reviewable under the same independent de novo standard as are questions of federal law. In this case, the question of state law arose in an admiralty action; however, our standard of review of a district court's interpretation of state law would be the same in a diversity case or any other case in which the district court's decision involves state law.

In our view, a decision to give less than full independent de novo review to the state law determinations of the district courts would be an abdication of our appellate responsibility. Every party is entitled to a full, considered, and impartial review of the decision of the trial court. We review questions of fact under the clearly erroneous standard and we review conclusions of law de novo. There is no justification for being less thorough, for abdicating any portion of our appellate responsibility, or for curtailing the parties' appellate rights simply because the law involved is state law. The parties are entitled to the same careful, independent consideration of the issues of law by the appellate court whether the case involves state law or federal law.

The parties are accorded independent de novo review of issues of law in the appellate courts, not because of any greater wisdom of appellate judges than of trial judges, but because of the structural differences between the two courts. This court, sitting en banc, has recently

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*v. Howard*, 679 F.2d 147, 150 (9th Cir.1982) and *Bank of California, N.A. v. Opie*, 663 F.2d 977, 979 (9th Cir.1981) (according little or no special deference where the district court relies on state law that offers only general guidance).

considered at length the structural relationship between the district courts and the court of appeals. *United States v. McConney*, 728 F.2d 1195, 1201-04 (9th Cir.1984) (en banc). We observed that the standards of review we apply to trial court decisions have been developed to protect the parties' rights to appeal and to achieve sound judicial administration by recognizing the structural differences in the two types of courts. Thus, the application of Fed.R.Civ.P. 52(a)'s clearly erroneous standard to the district courts' factual determinations "emphasizes . . . the trial judge's opportunity to judge the accuracy of witnesses' recollections and make credibility determinations . . . ." *Id.* at 1201. On the other hand, we observed in *McConney* that the application of the de novo standard to the trial courts' conclusions of law reflects a different policy concern. As we stated in *McConney*:

> Structurally, appellate courts have several advantages over trial courts in deciding questions of law. First, appellate judges are freer to concentrate on legal questions because they are not encumbered, as are trial judges, by the vital but time-consuming, process of hearing evidence. Second, the judgment of at least three members of an appellate panel is brought to bear on every case. It stands to reason that the collaborative, deliberative process of appellate courts reduces the risk of judicial error on questions of law. Thus, de novo review of questions of law, like clearly erroneous review of questions of fact, serves to minimize judicial error by assigning to the court best positioned to decide the issue the primary responsibility for doing so.

*Id.* (footnote omitted).

As noted above, we apply the de novo standard to the trial courts' determinations of federal law questions. *In re Bialac*, 712 F.2d 426, 429 (9th Cir.1983); *Hoptowit v. Ray*, 682 F.2d 1237, 1245 (9th Cir.1982); *United States v. One Twin Engine Beech Airplane*, 533 F.2d 1106, 1108 (9th Cir.1976). when the trial courts are called upon to resolve questions of foreign law, we also review their conclusions under the de novo standard. Fed.R.Civ.P. 44.1. *See also Kalmich v. Bruno*, 553 F.2d 549, 552 (7th Cir.), *cert. denied*, 434 U.S. 940, 98 S.Ct. 432, 54 L.Ed.2d 300 (1977); 9 C. Wright & A. Miller, *Federal Practice & Procedure* § 2446 (1971). There is no sound reason why we have a lesser appellate duty to the parties to make a correct, independent determination when the question is one of state law. The policy concerns supporting the de novo standard apply as well to questions of state law as to questions of federal law. The appellate function is the same in each case and the same structural advantages encourage correct legal determinations.

The parties to a civil action may appeal "as a matter of right" under Fed.R.App.P. 3 from the final judgment of a district court to the circuit court of appeals except where direct review may be had in the Supreme Court. *See* 28 U.S.C. § 1291 (1982); 9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice* ¶203.03 (2d ed. 1980); 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3901 at 398 (1976); *see also United States v. De Bright*, 730 F.2d 1255, 1259 (9th Cir.1984) (en banc) (statutory right of appeal of criminal defendant under 28 U.S.C. § 1291). The Supreme Court has direct appellate review of district court decisions in a few cases under 28 U.S.C. §§ 1252 and 1253.

It has been argued that Supreme Court precedent requires our deference to conclusions of state law by the district court because the Supreme Court has chosen not to review questions of state law in a number of cases and has deferred to the interpretation of the lower courts. In each instance, however, the parties had already received the mandatory appellate review in the circuit court. In none of these cases was the Supreme Court exercising direct appellate review from the district court. For example, in *Runyon v. McCrary*, 427 U.S. 160, 181-82, 96 S.Ct. 2586, 2599-2600 (1976), it is apparent that the Supreme Court did not defer to the initial conclusion by the trial judge, but accepted the determination by the appellate court.

> The petitioners' contention is certainly a rational one, but we are not persuaded that the *Court of Appeals* was mistaken in applying the two-year state statute. The issue was not a new one for that court, for *it* had given careful consideration to the question of the appropriate Virginia statute of limitations to be applied in federal civil rights litigation on at least two previous occasions. . . . We are not disposed to displace the considered judgment of the *Court of Appeals* on an issue whose resolution is so heavily contingent upon an analysis of state law, particularly when the established rule has been relied upon and applied in numerous suits filed in Federal District Courts in Virginia. In other situations in which a federal right has depended upon the interpretation of state law, "the Court has accepted the interpretation of state law in which the *District Court and the Court of Appeals have concurred* even if an examination of the state-law issue without such guidance might have justified a different conclusion." *Bishop v. Wood*, 426 U.S. 341, 346, and n. 10 [96 S.Ct. 2074,

> 2078, and n.10, 48 L.Ed.2d 684], citing, *inter alia*, *United States v. Durham Lumber Co.*, 363 U.S. 522 [80 S.Ct. 1282, 4 L.Ed.2d 1371]; *Propper v. Clark*, 337 U.S. 472 [69 S.Ct. 1333, 93 L.Ed. 1480]; *Township of Hillsborough v. Cromwell*, 326 U.S. 620 [66 S.Ct. 445, 90 L.Ed. 358].

(Citations and footnote omitted; emphasis added.)

In *Runyon* and the cases cited in that opinion, there had been no disagreement between the district court and the court of appeals. The approach of the Supreme Court becomes more apparent in the case where the district court and the court of appeals disagree. *Butner v. United States*, 440 U.S. 48, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979) is such a case. There the court of appeals, in a two-to-one decision, had reversed the district court on an issue of state law. The Supreme Court affirmed, stating "We decline to review the state law question." *Id.* at 57-58, 99 S.Ct. at 919. the Court thus upheld the determination of the two-judge majority on the court of appeals even though it was contrary to that of the district judge and the dissenting appellate judge. The words chosen by the Court are important in that they accurately indicate what the Supreme Court is doing: it is not giving weight or deference to the decision of the district judge or the court of appeals, rather it is simply not reviewing the state law question that has been fully reviewed and determined by the intermediate appellate court.

Implicit in the Supreme Court's practice of not reviewing the state law question is the assumption that it need not exercise its discretionary jurisdiction to do so because the appellate panel has exercised its mandatory

appellate jurisdiction by giving full and independent review to the decision of the trial judge. This practice by the Supreme Court is a jurisprudential decision that recognizes the structure of the federal court system; the Supreme Court is free to conserve its discretionary powers because the parties have already been accorded full appellate review. To fulfill our role within the federal court structure, we should review all legal issues, whether of state or federal law, under the independent de novo standard.

It is most appropriate, of course, that we respect the views of the district court judges and review with great care their determinations of both state and federal law. Indeed, this respect is inherent in the adversary system, which assigns to the appellant the duty to establish the errors in the trial court's decision. The district judge is an expert in determining and applying the state law, but is no less an expert in determining and applying the federal law. There is no sound reason for according greater weight to the former than to the latter.

Our independent determination of state law should be based upon recognized sources that are available to the parties and that may be argued and contested before the district court as well as before the appellate court. These sources include the relevant statutes, legislative history, treatises, restatements, and published opinions. Our determination should not be based upon some undefined special knowledge or feeling for the state law that the district judge may be presumed to have, but that cannot be articulated by the judge, argued by the parties, or reviewed by the appellate court.

The deferential standard, whether the appellate court affirms in the absence of "clear error" or gives the "great weight" that the dissent would accord to all state law determinations by the district judge, is not based upon the reasoning and persuasiveness of the judge's decision, which is always entitled to careful consideration. Instead, it is based on an assumption that the district judge has some particular knowledge or experience in the field of law in issue that is to be given great weight apart from the authorities presented by the parties or articulated by the district judge. This is an unsound ground on which to base our decisions. First, it depends upon *ad hominem* factors not part of the record. Second, it invites exploration of each judge's actual experience. *See, e.g., In re Big River Grain, Inc.*, 718 F.2d 968, 970 (9th Cir.1983) (per curiam) (comparing state court experience of district court judge and bankruptcy judge); *Metropolitan Life Insurance Co. v. Kase*, 718 F.2d 306, 307 (9th Cir. 1983) (according less deference where panel members were former state court judges); *Yamaguchi v. State Farm Mutual Automobile Ins. Co.*, 706 F.2d 940, 946 n. 5 (9th Cir.1983) (declining to accord deference where trial judge sitting by designation). Bringing such considerations into the decisional process is neither proper nor efficient. It shifts the focus from the appropriate legal authorities to the biography of the judge.

The present case illustrates the point. The district judge is a respected jurist sitting in the state of Alaska, a former practicing attorney in Alaska, and a former state trial judge in Alaska. One of the members of the appellate panel is also a respected jurist, a resident of the state of Alaska, a former practicing attorney there, and a former

Justice of the Alaska Supreme Court. It is not sensible to give "great weight" to the decision of one of these judges and not the other. More importantly, it misdirects the focus of the inquiry.

The application of the "clear error" standard or the dissent's "great weight" standard certainly cannot be justified by any desire to conserve judicial resources or to promote administrative efficiency. The parties have a statutory right to appeal state law questions and we must undertake the same full and careful review of the pertinent legal authorities whether or not deference is to be accorded. We are the first level of appellate review of the trial court's conclusions of law. There would be no justification for us to use deference to the trial judge's determination as an excuse for cursory or more limited inquiry into the state law question. There is an entirely different situation when the Supreme Court reviews cases involving state law when there has been a thorough appellate review of the state law issue at a lower level.

It is worth noting that if the parties were to proceed in a state court to litigate a state law issue, they would have the right to an independent de novo review of the trial judge's determination by a multi-judge appellate panel with the structural advantages heretofore noted. The parties should be entitled to the same appellate consideration in the federal court system. There is no reason why an appellant should have a greater burden in seeking review of the trial court's conclusions of law because he is in a federal forum.

The dissent seems to agree that independent de novo review of the district court's conclusions of law is required, and yet it advocates a standard of deference to the decision of the trial judge. We cannot have independent de novo review and still defer to the decision of the district judge. The concepts are inconsistent. Either we defer, as we do under Fed.R.Civ.P. 52(a), or we reach an independent judgment, as we do on the district court's conclusions of federal law. The dissent would shift from a "clear error" standard of deference to a new expression of that deference that gives "great weight" to the decision of the district court. Whether this would create more or less deference is difficult to say, but it is clear that in deferring to the decision of the district court we would not be according the parties an independent determination of the law. There is a very real distinction between *deferring to the conclusions* of the district judge, as opposed to *considering the reasoning* of the district judge with the respect that is certainly due. If we give "great weight" to the *conclusion* of the district judge simply because it is his or her *conclusion*, then we have not made an independent determination of the law.

The functions of the appellate court have traditionally been described as two-fold. The first is to review for correctness, which is the prime consideration of the parties. The second is the institutional function of announcing, clarifying, and harmonizing the rules of decision employed by the legal system in which they serve. *See* P. Carrington, D. Meador & M. Rosenberg, *Justice on Appeal*, 2-3 (1976). As noted in *McConney*, de novo review of questions of law is dictated in part because of the precedential effect of those questions on future litigants.

While the trial courts' factual determinations bind only the parties, the determination of legal issues affects the rights of future litigants. *McConney*, 628 F.2d at 1201. Although this aspect is not as important when we are concerned with state law as when we are concerned with federal law, because our opinions are not binding precedent, yet our determinations of state law are also of significant precedential importance. When we interpret state law under the doctrine of *Erie v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), we are bound to strive for uniform application of state law in state and federal courts. *Fidelity Trust Co. v. Field*, 311 U.S. 169, 179-80, 61 S.Ct. 176, 179, 85 L.Ed. 109 (1940); *see also* Note, *Deference to Federal Circuit Court Interpretations of Unsettled State Law*, 1982 Duke L.J. 704, 706, 732. "Diversity jurisdiction, especially in its post-*Erie* incarnation, should not create needless diversity in the exposition of state substantive law." *Factors etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 283 (2d Cir.1981), *cert. denied*, 456 U.S. 927, 102 S.Ct. 1973, 72 L.Ed.2d 442 (1982). Uniformity among federal interpretations of state law tends to create state-federal uniformity. *See id.* at 282. For this reason, federal court interpretations of undecided state law issues do have precedential value, *see* 1A J. Moore, *Moore's Federal Practice*, § 0.309(2) at 3122, 3123 n. 19 (2d ed. 1978), and therefore deserve the attention we generally grant to the creation of precedent.

The precedential importance that our appellate determinations of state law can have can be illustrated by two Ninth Circuit cases. In 1969, the Ninth Circuit in *Monolith Portland Midwest Co. v. Kaiser Aluminum & Chemical Corp.*, 407 F.2d 288, 293 (9th Cir.1969), decided the issue of when

a particular cause of action arose under California law for purposes of applying the statute of limitations. This holding was cited and relied upon by the California Supreme Court in *Davies v. Krasna*, 14 Cal.3d 502, 121 Cal.Rptr. 705, 711, 535 P.2d 1161, 1167 (1975). Both cases were then cited and relied upon in *Whittaker Corporation v. Execuair Corporation*, 736 F.2d 1341 (9th Cir.1984).

A second illustrative case is *Scandinavian Airlines System v. United Aircraft Corp.*, 601 F.2d 425, 429 (9th Cir.1979), which involved an application of California's strict liability law to two large corporations contracting with each other from positions of relatively equal strength. This holding was in turn cited and relied upon by the Second Circuit in construing California law in *Tokio Marine & Fire Insurance Co. v. McDonnell Douglas Corp.*, 617 F.2d 936, 939 (2d Cir.1980). One or both of these two circuit cases have been cited and relied upon in numerous other cases construing California law.[2] One recent Ninth Circuit case upheld the dismissal of a strict liability claim solely on the basis of the *Scandanavian Airlines* holding on this point of California law. *S.A.*

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[2] Some of the cases relying upon *Scandinavian airlines* are *Airlift International, Inc. v. McDonnell Douglas Corp.*, 685 F.2d 267, 269 (9th Cir. 1982); *Aeronaves De Mexico, S.A. v. McDonnell Douglas Corp.*, 677 F.2d 771, 772 (9th Cir.1982); *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines v. Boeing Company*, 641 F.2d 746, 754 (9th Cir.1981); *Purvis v. Consolidated Energy Products Co.*, 674 F.2d 217, 220, 224 (4th Cir.1982); *International Knights of Wine, Inc. v. Nave Pierson Winery, Inc.*, 110 Cal.App.3d 1001, 1006, 168 Cal.Rptr. 301, 303 (Cal.Ct.App.1980).

*Empresa de Viacao Aerea Rio Grandense (Varig Airlines) v. Walter Kidde & Company, Inc.*, 690 F.2d 1235, 1239-40 (9th Cir.1982). These cases are merely illustrative of the many cases in which we construe state law that are subsequently relied upon by other courts.

Thus it is clear that many of our decisions construing state law have significant precedential effect, even though they are not binding precedent in the state. Yet when closely analyzed, if those holdings are based on the clear error standard, they are not really holdings by appellate panels that construe state law. Instead, they are holdings that the district judges' construction of state law is not clear error.[3] We owe a greater appellate duty than this when we establish precedent to be relied upon by other trial and appellate courts. This deficiency in our present standard of review would not be alleviated by the standard proposed in the dissent. When an appellate panel if reviewing the decision of the district court under a deferential standard which accords "great weight" to the *conclusions* of a district judge, the holding of that panel is not an independent appellate construction of state law, but one that is greatly weighted toward the

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[3] Theoretically, if a second district judge disagreed with the first district judge and the appellate panel has only held that the decision of the first judge was not "clear error," the second judge could hold to the contrary and the appellate panel should affirm if the decision of the second district judge also was "not clear error." This illustrates the fallacy of our present standard of review. As a practical matter, the circuit court opinion would probably be relied upon as though it were an independent de novo construction of state law, which it is not.

construction given by the district judge. With the significant precedential effect that our opinions construing state law can have, this affords another reason why our standard of review should be the same as the standard of review we utilize in determining questions of federal law and, indeed, the same standard utilized by the state appellate courts in reviewing the trial courts' construction of their state law – that is, an independent de novo appellate review.

There is more agreement between the majority opinion and the dissenting opinion on this standard than at first might appear. The dissent agrees that the proper exercise of our appellate function is "de novo review over all questions of law, whether state or federal." The dissent also agrees that "it is our duty to exercise our independent judgment" and that our appellate court review of state law question should not be "narrower in character than its review of other legal questions." The dissent concedes that we cannot properly perform this appellate function under our circuit's prior "clear error" standard. Where the dissent parts company with the majority opinion is in the assertion that if we simply express this deference or weight given to the district court's conclusion in different terminology, we somehow meet this appellate obligation. In our view, if we give great weight or defer to the *conclusion* of the district judge, it is not an independent judgment, but a weighted or deferential judgment and the review is clearly under a narrower standard than questions of federal law.

Both the majority and the dissenting opinions agree that careful consideration should be given to the reasoned explanations of state law by the district court. The

dissent completely mischaracterizes the majority opinion when it states that we adopt a view that "the district court is entitled to no consideration." It is difficult to understand how the dissent could arrive at this conclusion, when we have emphasized that the district court's reasoned explanation for a holding on a question of state law will be given full, thorough, and respectful consideration, just as it is on questions of federal law. It is even more difficult to understand how the dissent could possibly conclude that the time district courts spend "thoroughly explaining a state law is time wasted" and that "we therefore will be deprived of their expertise." This is certainly not the case with the district court's determination of federal law, to which the same standard applies. It is inconceivable that the highly competent and thorough district judges in this circuit would in any way be dissuaded from considering just as fully and fairly questions of state law as they do questions of federal law. In fact, because it is the reasoned explanation of state law that we will look to, rather than simply the district court's conclusion, it would seem that there would be a strong incentive for thorough and well-reasoned explanations.

In conclusion, in order to perform properly the appellate function in the review of state law questions, we must apply the same standard of review as we do in determining all other questions of law. We see no justifiable reason to distinguish between the standard of review for determinations of federal law and of state law. We hold that our appellate review of conclusions of state law should be under the same independent de novo standard as conclusions of federal law.

The case is remanded to the original panel for disposition consistent with this opinion.

SCHROEDER, Circuit Judge, with whom BROWNING, Chief Judge, ANDERSON, TANG and FERGUSON, Circuit Judges, join, dissenting.

I dissent from the majority's holding that henceforward the Ninth Circuit Court of Appeals will give no special consideration whatever to the decision of a district court on the state law of its home jurisdiction. The holding is not only a major departure from our own practice, but is contrary to all the reported decisions of the other circuits as well as the views of scholarly authorities on the question.

The result can only serve as a disincentive to our district courts to explore and explain the authorities which bear on an issue of local law. It will tend to deprive the litigants of the benefit of that effort. It will encourage unsuccessful counsel to appeal on the assumption that reversals will become more frequent. Our own work will multiply. Sadly, the majority arrives at this result without an analysis of purpose, and in the face of overwhelming authority from the other circuits. We are not told why this novel view, rather than the standards applied by other circuit courts, is required to reach a just result in this or any other case.

With increasing frequency, federal courts have had to deal with unresolved issues of state law since *Erie Railroad v. Tompkins*, 304 U.S. 64, 58, S.Ct. 817, 82 L.Ed.1188 (1938). In that decision Justice Brandeis declared there to be no federal general common law, 304 U.S. at 78, 58 S.Ct. at 822, and overturned the doctrine of *Swift v. Tyson*, 41

U.S. 1, 16 Pet. 1, 10 L.Ed. 865 (1842), that federal courts should "exercise an independent judgment as to what the common law of a state is – or should be. . . ." *Erie*, 304 U.S. at 71, 58 S.Ct. at 819. Under *Erie*, the federal court's function is not to choose the rule that it would adopt for itself, if free to do so, but to choose the rule that it believes the state court, from all that is known about its methods of reaching decisions, is likely in the future to adopt.

C. Wright, *Handbook of the Law of Federal Courts* § 58, at 375 (4th ed. 1983) ("Wright").

In addressing state law issues on appeal, circuit courts have developed the practice of giving special consideration to a district court's decisions on state law questions arising under the law of the district court's home jurisdiction. Sound practical reasons underlie the development: the appellate courts can benefit greatly from a district judge's past experience and day to day familiarity with issues of state law within that judge's state. *See* 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2588, at 752 (1971) ("Wright & Miller").

While the precise articulation of the nature of the special consideration due district court decisions varies from circuit to circuit, and even from case to case within a circuit, the most common formulation is in terms of "great weight" or "substantial deference." Leading examples are: *Caspary v. Louisiana Land and Exploration Co.*, 707 F.2d 785, 788 n. 5 (4th Cir.1983) (substantial deference); *Smith v. Mobil Corp.*, 719 F.2d 1313, 1317 (5th Cir.1983) (quoting *Avery v. Maremont Corp.*, 628 F.2d 441, 446 (5th Cir.1980) (great weight); *Randolph v. New England Mutual*

*Life Insurance Co.*, 526 F.2d 1383, 1385 (6th Cir.1975) (considerable weight); *Morin Building Products Co. v. Baystone Construction, Inc.*, 717 F.2d 413, 416 (7th Cir. 1983) ("it is only prudent to defer to the view of the district judge"); *Kansas City Power and Light Co. v. Burlington Northern Railroad Co.*, 707 F.2d 1002, 1003 (8th Cir.1983) (great deference unless deficient in analysis or authority); *Campbell v. Joint District 28-J*, 704 F.2d 501, 504 (10th Cir.1983) (extraordinary force); *Alabama Electric Cooperative, Inc. v. First National Bank of Akron, Ohio*, 684 F.2d 789, 792 (11th Cir.1982) (deference). For dramatic illustration of the point, I attach to this opinion as an appendix the headnotes from the West Digest's key number 785, covering cases from 1979 to 1983. They vividly demonstrate the cadence to which others are marching and from which we today fall completely out of step.

The majority adopts the polar opposite view that the district court is entitled to no consideration. It makes the unique assertion that "we cannot have independent de novo review and still defer to the decision of the district court: the concepts are inconsistent." The majority is misusing those terms as they are applied in this context. The majority's confusion is evident in its repeated mischaracterization of the standard which it today rejects. It says we have permitted reversal only for "clear error." As the following discussion demonstrates, that is not the standard which this court, or other circuit courts, have properly applied to questions of state law.

Appellate courts exercise de novo review over all questions of law, whether state or federal. Appellate

courts may, and, as the cases demonstrate overwhelmingly, do substitute their judgments for the judgments of district courts on state as well as federal issues. By giving "substantial deference," or what I believe to be the better phrase, "great weight," to the decisions of the district courts, appellate courts do not suspend their own thought processes. They treat the expertise of the district judge in local law as a factor that requires a careful review of the district court's decision before the appellate court reaches a different conclusion. The circuits have not, as the majority would have us believe, been guilty of a massive "abdication" of responsibility.

The appropriate analysis should begin with the difference between appellate review of issues of fact and issues of law. The standard of review for questions of fact tried to a district court is set forth expressly in Rule 52(a) of the Federal Rules of Civil Procedure: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Drawn from prior equity practice, *see* Fed.R.Civ.P. 52, Notes of Advisory Committee on Rules, the rule means that as to matters of fact, the appellate court is bound by the trial court's findings unless the appellant demonstrates that a finding is clearly erroneous. *See Purer & Co. v. Aktiebolaget Addo*, 410 F.2d 871, 878 (9th Cir.), *cert. denied*, 396 U.S. 834, 90 S.Ct. 90, 24 L.Ed.2d 84 (1969). The rule recognizes that the district court is in a unique position to admit the evidence, hear the testimony, and evaluate the credibility and demeanor of witnesses. *See, e.g., Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 855, 102 S.Ct. 2182, 2188, 72 L.Ed.2d 606 (1982).

The appellate court is not free to substitute its judgment on the meaning of the evidence for that of the district court. *Inwood Laboratories*, 456 U.S. at 857-58, 102 S.Ct. at 2190.

The district court's conclusions of law, in contrast, are freely reviewable by the appellate court unfettered by the limitations of Rule 52(a). *See United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 526, 81 S.Ct. 294, 297, 5 L.Ed.2d 268 (1961); *United States v. Rosales*, 584 F.2d 870, 872 (9th Cir.1978); *Phoenix Title and Trust Co. v. Stewart*, 337 F.2d 978, 985 (9th Cir. 1964), *cert. denied*, 380 U.S. 979, 85 S.Ct. 1335, 14 L.Ed.2d 273 (1965). The record is not closed, and the appellate court may review all relevant legal authorities. In questions of law "we are not confined to the 'clearly erroneous' or some other restricted standard of review, but it is our duty to exercise our independent judgment. . . ." *Rosales*, 584 F.2d at 872.

Yet differences exist between the appellate and the district courts in their respective relationships to the law of a particular state. As a practical matter district judges hear a great number of cases involving the law of their home states. This court's appellate jurisdiction, on the other hand, encompasses nine states, and questions of state law arise from all of them. Moreover, district judges generally have practiced within a state for some years while appellate court judges, more often than not, have no similar relationship to the law of the state in question.

Giving special consideration to district court decisions on state law issues does not mean that appellate court review should be narrower in character than its

review of other legal questions. The point has been well expressed in our own circuit:

> An Appellate Court should give great weight to the determinations of state law made by a district judge experienced in the law of that state, but the parties are entitled to a review of the trial court's determinations of state law just as they are as to any other legal question in the case.

*Portland General Electric Co. v. Pacific Indemnity Co.*, 574 F.2d 469, 471 (9th Cir. 1978).

The majority overreacts to a problem that is basically one of terminology. The phrase this Circuit, and to some extent the Tenth Circuit, has used most frequently is that the appellate court will follow the district court's interpretation of state law unless it is "clearly wrong." The wording of this formulation is similar to the Rule 52(a) "clearly erroneous" standard of review of factual findings. This similarity is unfortunate, for it connotes that a district court's decision on a legal issue binds the appellate court just as a district court finding of fact binds the appellate court. In some opinions, we have even used the phrase "clearly wrong" and "clearly erroneous" interchangeably. *See, e.g., Donaldson v. United States*, 653 F.2d 414, 416 (9th Cir.1981); *Gaines v. Haughton*, 645 F.2d 761, 770 (9th Cir.1981), *cert. denied*, 454 U.S. 1145, 102 S.Ct. 1006, 71 L.Ed.2d 297 (1982). The result has been a tendency in a few of our decisions to look only to whether plausible support exists for the district court's legal conclusion, thereby according it presumptive validity. *See e.g., Monte Carlo Shirt, Inc. v. Daewoo International (America) Corp.*, 707 F.2d 1054, 1056-57 (9th Cir. 1983); *Smith v. Sturm, Ruger & Co.*, 524 F.2d 776, 778 (9th Cir.1975).

Such excessive reliance on the district court has led to criticism of our formulation.

> [T]here is some tendency . . . to say that if the trial court has reached a permissible conclusion under state law, the appellate court cannot reverse even if it thinks the state law to be otherwise, thereby treating the question of state law much as if it were a question of fact. The determination of state law, however, is a legal question, and although the considered decision of a district judge experienced in the law of the state naturally commands the respect of an appellate court, a party is entitled to meaningful review of that decision just as he is of any other legal question in the case. . . .

C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4507, at 107-09 (1982). *See* 1A J. Moore, W. Taggart, A. Vestal & J. Wicker, *Moore's Federal Practice* ¶ 0.309[2], at 3128 n. 28 (2d ed. 1983); Wright, *supra* § 58, at 375-76; Wright & Miller, *supra*.

The Eighth Circuit recognized the problem when it abandoned the "clearly wrong" standard, nothing that the legal effect of that formulation might be to "preclude appellate consideration of an issue involving a significant question of law." *Luke v. American Family Mutual Insurance Co.*, 476 F.2d 1015, 1019 n.6 (8th Cir.1972), *cert. denied*, 414 U.S. 856, 94 S.Ct. 158, 38 L.Ed.2d 105 (1973). The Eighth Circuit adopted a standard of giving "substantial deference." It did not find such deference inconsistent with its appellate function. We should profit from this example. The majority ignores it.

The majority's insistence that giving any weight to the decision of the district court on an issue of state law is

an "abdication" of our responsibility to give independent consideration to the question utterly misses the point of the nearly 50 years of experience of the federal appellate courts since *Erie*. The special weight that should be given to a district court's decision is not intended to make our examination any less thorough or independent. It is intended to make us more careful. Its purpose is to prevent hasty and perhaps arbitrary decisions in areas of local law with which we may not be fully familiar. Giving special consideration to a district court's decision on a state law question is a responsible exercise of appellate authority.

The majority endeavors unsuccessfully to find support for its view in United States Supreme Court decisions that defer to decisions of lower federal courts on state law issues. *See, e.g., Runyon v. McCrary*, 427 U.S. 160, 181-82, 96 S.Ct. 2586, 2599-2600, 49 L.Ed.2d 415 (1976); *Bishop v. Wood*, 426 U.S. 341, 345-46 & n. 10, 96 S.Ct. 2074, 2077-2078 & n. 10, 48 L.Ed.2d 684 (1976); *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 204-05, 76 S.Ct. 273, 277, 100 L.Ed.199 (1956). The majority argues that the Supreme Court's acceptance of lower court decisions on state law issues somehow reflects approval of the proposition that courts of appeals should give no weight to district court expertise. In fact, Supreme Court deference is based upon the very assumption of expertise in local law that the majority today rejects. Thus, in a case in which the court of appeals had rules on a state law question, the Supreme Court deferred to the court of appeals "[s]ince [the court] is much closer to [state] law than we are. . . ." *United States v. Durham Lumber Co.*, 363 U.S. 522, 527, 80 S.Ct. 1282, 1285, 4 L.Ed.2d 1371 (1960). In

the same sense, district courts are closer to local law than are the circuit courts. Thus the Supreme Court's reasoning requires – not forbids – us to give weight to the district court decision on an unsettled issue of state law.

The most regrettable aspect of today's decision is the message it sends to the district courts and the litigants. It suggests to the district courts that time spent thoroughly explaining a state law question is time wasted; we therefore will be deprived of their expertise. At the same time, the majority signals to litigants that reversals will be easier to obtain, thus encouraging more appeals. The inevitable result is that we will be faced with more state law issues, but provided with less guidance. The majority offers this result, without any attempt to demonstrate that the standard it now decries has led to unfairness or incorrect results. I therefore dissent.

## APPENDIX

*West's Federal Practice Digest 2d* (1983 cum. pamphlet) Federal Courts Key #785: Weight to be accorded trial judge's holding (Ninth Circuit cases deleted):

**C.A.Ark. 1981**. Court of Appeals will give special weight to trial judge's interpretation of state law in diversity cases; nevertheless, Court of Appeals is not bound by district court's interpretation of state law and must reverse if it finds that district court has not correctly applied local law. – Red Lobster Inns of America, Inc. v. Lawyers Title Ins. Corp., 656 F.2d 381.

**C.A.Ark. 1981.** On questions of unsettled state law, Court of Appeals gives great weight to the district court's judgment. – Orlando v. Alamo, 646 F.2d 1288.

**C.A.Ark. 1979.** In diversity action, Federal Court of Appeals would apply law of state to issues before court and, in so doing, give great weight to district court's view of state law. – Foremost Ins. Co. v. Sheppard, 610 F.2d 551.

**C.A.Ark. 1978.** In diversity action, Court of Appeals will give great weight to interpretation of state law reached by trial judge who is familiar with local law. – Luster v. Retail Credit Co., 575 F.2d 609.

**C.A.Ark. 1978.** On appeal, great weight is given to trial judge's interpretation of local law. – Lide v. Carothers, 570 F.2d 253.

**C.A.Ark. 1977.** In a diversity case, interpretation of the district court on a question of state law is entitled to great deference. – Howard v. Green, 555 F.2d 178.

**C.A.Colo. 1983.** Views of the district court interpreting state law carry extraordinary force on appeal when there are no controlling state decisions providing clear precedent. – Campbell v. Joint Dist. 28 – J, 704 F.2d 501.

**C.A.Colo. 1983.** Where action is one based on diversity, deference is to be accorded views of resident federal district judge with respect to interpretation and application of law of the state and appellate review is governed by the clearly erroneous standard. – King v. Horizon Corp., 701 F.2d 1313.

**C.A.Colo. 1979.** Views of federal district judge in diversity case, who is resident of state where controversy arose, interpretative of state's laws carry extraordinary

force on appeal where there is no controlling state decisions providing clear precedent. – City of Aurora, Colorado v. Bechtel Corp., 599 F.2d 382.

**C.A.Colo. 1979**. Court of Appeals will give substantial weight to trial judge's perception of law of his resident state when law is unclear. – Glenn Justice Mortg. Co., Inc. v. First Nat. Bank of Fort Collins, 592 F.2d 567.

**C.A.Colo. 1978**. A federal appellate court should recognize and give deference to views of federal trial judge as to state law in his resident state, and such views should be accepted, on appeal, unless they be demonstrably in error. – In re Winters, 586 F.2d 1363.

**C.A.Colo. 1977**. In the absence of controlling state decisions interpreting state statutes or precedents, the views of federal district court judge who is resident of state carry extraordinary weight on appeal regarding interpretation of statute. – Adolph Coors Co. v. A & S Wholesalers, Inc. 561 F.2d 807.

**C.A.Fla. 1982.** Interpretation of state law by federal district judge sitting in that state is entitled to deference. – Alabama Elec. Co-op., Inc. v. First Nat. Bank of Akron, Ohio, 684 F.2d 789.

**C.A.Ga. 1979**. A Georgia federal district judge's interpretation of Georgia law was entitled to deference by Court of Appeals. – Kaufman and Broad Home Systems, Inc. v. International Broth. of Fireman and Oilers, AFL-CIO, 607 F.2d 1104, rehearing denied 612 F.2d 579.

**C.A.Ill. 1983**. Where no authoritative resolution of a legal issue had been rendered by state courts, district court's construction of state law on that issue is entitled

to great weight on appellate review. – Lamb v. Briggs Mfg., a Div. of Celotex Corp., 700 F.2d 1092.

**C.A.Iowa 1978.** The views of able and experienced district judges with respect to questions of local law are entitled to great weight. – Green v. American Broadcasting Companies, Inc., 572 F.2d 628.

**C.A.Iowa 1977.** Great weight is accorded district court's determination of questions of state law. – Merchants Mut. Bonding Co. v. Appalachian Ins. Co., 556 F.2d 899.

**C.A.La. 1982.** Great deference should be accorded to a district judge's interpretation of the law of his or her state. – Trahan v. First Nat. Bank of Ruston, 690 F.2d 466.

**CA.La. 1982.** In a diversity case, great deference is accorded the conclusions of state law reached by the district judge, schooled and skilled in the law of her state. – O'Toole v. New York Life Ins. Co., 671 F.2d 913, rehearing denied 677 F.2d 113.

**C.A.La. 1982.** In diversity cases which involve questions of local law, Court of Appeals will show deference to opinion of district court and give its views great weight, since federal judge who sits in particular state and has practices before its courts is better able to resolve difficult questions about law of that state than other federal judges lacking such experience. – Commonwealth Life Ins. Co. v. Neal, 669 F.2d 300.

**C.A.La. 1982.** In diversity cases, when no state court decisions are available, opinion of federal judge sitting in state whose law is to be applied is accorded special

deference. – Robertshaw Controls Co. v. Pre-Engineered Products, Co., Inc., 669 F.2d 298.

**C.A.Md. 1983.** In determining state law in diversity cases where there is no clear precedent, Courts of Appeals are disposed to accord substantial deference to opinion of federal district judge because of his familiarity with state law which must be applied. – Caspary v. Louisiana Land and Exploration Co., 707 F.2d 785.

**C.A.Minn. 1983.** Court of Appeals gives great weight to conclusions of local district judge on questions of state law. – O'Brien v. Heggen, 705 F.2d 1001.

**C.A.Minn. 1982.** On questions of state law, Court of Appeals normally defers to judgment of district court sitting in the particular state involved. – In re Schwen's, Inc., 693 F.2d 48.

**C.A.Minn. 1982.** Court of Appeals gives great weight to conclusions of local district judge on questions of state law. – Bergstrom v. Sambo's Restaurants, Inc., 687 F.2d 1250.

**C.A.Minn. 1982.** Court of Appeals accords great weight to conclusions of local trial judge on questions of state law. – Sperry Corp. and its Sperry Univac Div. v. City of Minneapolis, 680 F.2d 1234.

**C.A.Minn. 1979.** District court was entitled to deference from Court of Appeals on questions of law of state wherein district court sat. – Schuster v. U.S. News & World Report, Inc., 602 F.2d 850.

**C.A.Miss. 1982.** In diversity cases, Court of Appeals will accord special deference to decision of a federal district judge on the application of the law of the state in

which he sits especially when a statutory scheme is less than clear and capable of varying interpretation. – Golden v. Cox Furniture Mfg. Co., Inc., 683 F.2d 115, rehearing denied 685 F.2d 1385.

**C.A.Miss 1980.** Federal district court judge's determination on law in his state is generally entitled to great weight on review. – Watson v. Callon Petroleum Co., 632 F.2d 646.

**C.A.Miss. 1980.** In the absence of controlling Mississippi precedent, the Court of Appeals, reviewing judgment rendered in Mississippi diversity suit, was required to decide whether an employer might be liable in damages for discharging an employee for pursuing his workmen's compensation rights as the court believed the Mississippi court would decide the issue and, in this regard, special weight was to be given to determination of district court judge who was familiar with local law. – Green v. Amerada-Hess Corp., 612 F.2d 212, rehearing denied 614 F.2d 1298, certiorari denied 101 S.Ct. 356, 449 U.S. 952, 66 L.Ed.2d 216.

**C.A.Miss. 1978.** When state decisional law affords no guidance, interpretation of district judge, who was well versed in intricacies and trends of local law, is entitled to great deference. – Black v. Fidelity & Guaranty Ins. Underwriters, Inc., 582 F.2d 984.

**C.A.Mo. 1983.** The appellate court should give great deference to district court's determination of state law unless it is fundamentally deficient in analysis or otherwise lacking in reasoned authority. – Kansas City Power and Light Co. v. Burlington Northern R. Co., 707 F.2d 1002.

**C.A.Mo. 1983.** Interpretation of state law by district judge sitting in that forum is entitled to substantial deference in absence of controlling state precedent. – Nelson By Wharton v. Missouri Div. of Family Services, 706 F.2d 276.

**C.A.Mo. 1983.** Court of Appeals would defer to district court's interpretation of state law. – Glover v. Metropolitan Life Ins. Co., 698 F.2d 947.

**C.A.Mo. 1983.** Though district court's interpretation of the local law is entitled to great weight in diversity cases in which such law governs the issues, Court of Appeals is not bound by district court's interpretation of state law and must reverse if Court of Appeals finds that the district court has not correctly applied local law or if such interpretation of state law is fundamentally deficient in analysis or interpretation of state law is fundamentally deficient in analysis or otherwise lacking in reasoned authority. – R.W. Murray Co. v. Shatterproof Glass Corp., 697 F.2d 818.

**C.A.Mo. 1982.** Substantial deference is accorded district court's interpretation of local law in absence of controlling state precedent. – Renfroe v. Eli Lilly & Co., 686 F.2d 642.

**C.A.Mo. 1980.** Where issues in federal court are governed by state law, opinion of local federal district judge interpreting such law is entitled to great weight. – Hunter v. U.S., 624 F.2d 833.

**C.A.Mo. 1980.** Court of Appeals customarily defers to views of district court on questions of law of their forum states. – Jump v. Goldenhersh, 619 F.2d 11.

**C.A.Mo. 1979.** Federal court gives great weight to conclusion of local trial judge on questions of state law. – Lamb v. Amalgamated Labor Ins. Co., 602 F.2d 155.

**C.A.Mo. 1978.** Court of Appeals will give special weight to trial judge's interpretation of state law in diversity cases; nevertheless, court is not bound by district court's interpretation of state law and must reverse if it finds that district court has not correctly applied local law. – Bazzano v. Rockwell Intern. Corp., 579 F.2d 465.

**C.A.Mo. 1978.** In diversity case, Court of Appeals will accord great weight to conclusions of local judge on questions of local law. – Bergstreser v. Mitchell, 577 F.2d 22.

**C.A.Mo. 1976.** Rodeway Inns of America, Inc. v. Frank, 541 F.2d 759, certiorari denied 97 S.Ct. 1580, 430 U.S. 945, 51 L.Ed.2d 792.

**C.A.Neb. 1983.** In diversity cases in which state law governs issues, district court's interpretation of that local law is entitled to great weight; however, Court of Appeals is not bound by district court's interpretation of state law and must reverse if it finds that district court has not correctly applied local law, or if such interpretation of state law is fundamentally deficient in analysis or otherwise lacking in reasoned authority. – Gillette Dairy, Inc. v. Mallard Mfg. Corp., 707 F.2d 351.

**C.A.Neb. 1983.** Court of Appeals is not bound by trial judge's interpretation of state law, but such interpretation is nonetheless given special weight in diversity cases. – Kizzier Chevrolet Co., Inc., of Scottsbluff, Neb. v. General Motors Corp., Oldsmobile Div., 705 F.2d 322.

**C.A.Neb. 1982.** Interpretation of state law by a district judge sitting in that forum is entitled to great deference. – Lewis Service Center, Inc. v. Mack Financial Corp., 696 F.2d 66.

**C.A.Neb. 1982.** Although trial judge's interpretation of state law does not bind Court of Appeals, such interpretation deserves great weight. – Zrust v. Spencer Foods, Inc., 667 F.2d 760.

**C.A.Neb. 1981.** Court will give deference to district court's findings on state laws where there is no strong argument that such choice of law is fundamentally deficient in analysis or otherwise lacking in reasoned authority. – Ancom, Inc. v. E.R. Squibb & Sons, Inc., 658 F.2d 650.

**C.A.Neb. 1979.** With respect to questions of substantive state law, opinion of experienced local judge is entitled to great weight. – McPherson v. Sunset Speedway, Inc., 594 F.2d 711.

**C.A.Neb. 1977.** Although Court of Appeals is not bound by district court's interpretation of local law in diversity case, "great weight" is to be accorded its determination. – Lincoln Carpet Mills, Inc. v. Singer Co., 549 F.2d 80.

**C.A.N.M. 1980.** Where New Mexico Supreme Court had not ruled on issues presented in motorcycle insurer's action seeking a declaration with respect to its liability for injuries sustained by passenger of insured motorcycle, decision of Court of Appeals on substantive law issues presented would be predicated on its interpretation of how New Mexico Supreme Court would construe the law if faced with similar facts and issues; in that regard,

resident district court's views on questions of New Mexico law would carry extraordinary force since there were no controlling state decisions providing clear precedent. – Farmers Alliance Mut. Ins. Co. v. Bakke, 619 F.2d 885.

**C.A.N.M. 1978**. Court of Appeals defers to resident district judge's view on an unsettled question of law unless it appears clearly wrong. – Mendoza v. K-Mart, Inc., 587 F.2d 1052.

**C.A.N.M. 1978**. Federal court will ordinarily accept view of resident district judge on unsettled law of his state unless it is clearly wrong. – Vallejos v. C.E. Glass Co., 583 F.2d 507.

**C.A.N.D. 1979.** In diversity suit for declaratory judgment, rights of parties were governed by law of state, and with respect to that, law opinions of experienced local district judge were entitled to great weight. 28 U.S.C.A. § 2201. – American Motorists Ins. Co. v. Samson, 596 F.2d 804.

**C.A.N.D. 1977.** Views of a bankruptcy judge and a district judge on questions of purely local law are entitled to substantial weight. Bankr. Act, § 6, 11 U.S.C.A. § 24. – Grenz Super Valu v. Fix, 566 F.2d 614.

**C.A.N.D. 1977.** Court of Appeals usually gives deference to a district court's interpretation of state law. – Dakota Nat. Bank & Trust Co. v. First Nat. Bank & Trust Co. of Fargo, 554 F.2d 345, certiorari denied 98 S.Ct. 229, 434 U.S. 877, 54 L.Ed.2d 157.

**C.A.N.D. 1977.** Court of Appeals was bound to give great weight to district court's construction of applicable

state law in diversity case. – Jamestown Farmers Elevator, Inc. v. General Mills, Inc., 552 F.2d 1285.

**C.A.Okl. 1980.** Degree of deference should be given to resident federal district judge who was passing on question involving local state law. – Obieli v. Campbell Soup Co., 623 F.2d 668.

**C.A.Okl. 1980.** In a diversity case, views of federal district judge who is a resident of the state where the controversy arose, interpretive of state's laws, carry extraordinary force on appeal where there are no controlling state decisions providing clear precedent. – Lyles v. American Hoist & Derrick Co., 614 F.2d 691.

**C.A.Okl. 1979.** Some deference is due federal district judge's determination of law of his resident state when law is unclear. – Travelers Ins. Co. v. Panama-Williams, Inc., 597 F.2d 702.

**C.A.Okl. 1977.** Great deference is to be accorded views of resident federal district judge relative to interpretation and application of law of his state in absence of controlling precedents opined by highest court of that state, however, where state's highest court has opined, question is then one of law and Court of Appeals review is governed by "clearly erroneous" rule and reversal is required only if appellate court's review results in firm conviction that mistake has been committed. Fed.Rules Civ. Proc. rule 52, 28 U.S.C.A. – Mustang Fuel Corp. v. Youngstown Sheet & Tube Co., 561 F.2d 202.

**C.A.Okl. 1977.** The trial court's finding that partnership was not the continuation of corporation involved a question of state law, and if there were no controlling

state precedents, the resident federal district judge's interpretation and/or application of state law must be given extraordinary force on appeal. – R.J. Enstrom Corp. v. Interceptor Corp., 555 F.2d 277.

**C.A.Okl. 1976.** DeBoer Const., Inc. v. Reliance Ins. Co., 540 F.2d 486, certiorari denied 97 S.Ct. 741, 429 U.S. 1041, 50 L.Ed.2d 753.

**C.A.Okl. 1975.** Mustang Fuel Corp. v. Youngstown Sheet & Tube Co., 516 F.2d 33, on remand 411 F.Supp. 705, reversed 561 F.2d 202.

**C.A.Puerto Rico 1979.** When court is faced with question involving proper construction of Puerto Rico law, court gives considerable deference to district judges who are citizens of Puerto Rico and well versed in the Spanish underpinnings of Puerto Rico law. – Gual Morales v. Hernandez Vega, 604 F.2d 730.

**C.A.Puerto Rico 1979.** Much deference is accorded to district court's construction of law of locality in which it sits. – Garcia v. Friesecke, 597 F.2d 284, certiorari denied 100 S.Ct. 292, 444 U.S. 490, 62 L.Ed.2d 306.

**C.A.Puerto Rico 1978.** Court of Appeals generally will not consider claims not raised before district court, and particularly where question involves proper construction of Puerto Rican law, deference to district judges who are Spanish speaking and trained in Spanish civil law is warranted. – Gual Morales v. Hernandez Vega, 579 F.2d 677, on remand Morals v. Vega, 461 F.Supp. 656, affirmed 604 F.2d 730.

**C.A.S.C. 1977.** In the absence of definitive interpretation of statutes by state Supreme Court, Court of Appeals

would defer to conclusion reached by district judge whose service as state and federal judge had made him familiar with the laws of the state. – U.S. v. Burnsed, 566 F.2d 882, certiorari denied 98 S.Ct. 1270, 434 U.S. 1077, 55 L.Ed.2d 784.

**C.A.S.D. 1983.** District court's determination of state law is not binding on Court of Appeals. – Kotval v. Gridley, 698 F.2d 344.

**C.A.S.D. 1980.** In a diversity case, the Court of Appeals gives great weight to the district court's view of state law. – Greenwood Ranches Inc. v. Skie Const. Co., Inc., 629 F.2d 518.

**C.A.Tenn. 1981.** Federal Court of Appeals, in reviewing a district judge's interpretation of state law, is to give considerable weight to such interpretation. – Bagwell v. Canal Ins. Co., 663 F.2d 710.

**C.A.Tenn. 1981.** District judge's rulings on a matter of state law are entitled to respect by the Court of Appeals. – Transamerica Ins. Group v. Beem, 652 F.2d 663.

**C.A.Tex. 1981.** In reviewing a diversity action, Court of Appeals is reluctant to substitute its views of the state law for those of the district court judge. – Cole v. Elliott Equipment Co., 653 F.2d 1031.

**C.A.Tex. 1980.** Federal district court judge's determination on law in his state is entitled to great weight on review. – Avery v. Maremont Corp., 628 F.2d 441.

**C.A.Utah 1982.** Deference is to be accorded views of resident federal district judge with respect to interpretation and application of law of his state absent controlling

precedents held by highest court of that state. – Loveridge v. Dreagoux, 678 F.2d 870.

**C.A.Wis. 1982.** District court's construction of state law on issue state courts have not addressed is given great weight on appellate review. – Murphy v. White Hen Pantry Co., 691 F.2d 350.

**C.A.Wyo. 1980.** Where there are no controlling state decisions providing clear precedent, the views of the resident district judge on matters of state law carry extraordinary force on appeal. – Amoco Production Co. v. Guild Trust, 636 F.2d 261, certiorari denied 101 S.Ct. 3123, 452 U.S. 967, 69 L.Ed.2d 981.

**C.A.Wyo. 1980.** Absent clear error, Court of Appeals will defer to trial court's interpretation of state law of its district. – Smith v. Equitable Life Assur. Soc., 614 F.2d 720.

**C.A. Wyo. 1978.** Trial judge, having been a member of Wyoming bar and a practitioner, was presumed to be in superior position to predict from the evidence available whether Wyoming would follow majority or minority doctrine on subject involved in diversity action. – Fox v. Ford Motor Co., 575 F.2d 774.

**C.A.Wyo. 1978.** An interpretation of a state's laws by a federal district judge who is a resident of state where controversy arose carries extraordinary force on appeal in a diversity case where there are no state decisions directly on point or none which provided a clear precedent. Fed.Rules Civ. Proc. rule 52(a), 28 U.S.C.A. – Rasmussen Drilling, Inc. v. Kerr-McGee Nuclear Corp., 571 F.2d 1144, certiorari denied 99 S.Ct. 183, 439 U.S. 862, 58 L.Ed.2d 171.

## APPENDIX B

**In the Matter of the Complaint of William McLINN, as owner of the F/V FJORD, her engines, tackle, boilers, and equipment for exoneration from, or limitation of liability.**

**In the Matter of the Complaint of Gilbert Jack JOHNSON and Jack Stewart Johnson, as owners of the F/V SUPERSONIC, her engines, tackle, boilers, and equipment, and as owners of one certain Beck 15 foot fiberglass skiff, her engine, tackle and equipment, for exoneration from, or limitation of liability.**

**Frank CHURCHILL, as the Informal Administrator of the Estate of Patrick Churchill and Dale Carlough, Plaintiffs-Appellants,**

**v.**

**The F/V FJORD, etc., et al., Defendants,**

**and**

**The F/V SUPERSONIC, her engines, tackle, apparel, appliances, equipment, apparatus and furniture; Gilbert Johnson, part owner and/or operator of said F/V SUPERSONIC; Jack Johnson, part owner of said F/V SUPERSONIC, Defendants-Appellees.**

**No. 82-3644.**

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Aug. 17, 1983.

Decided Oct. 3, 1984.

Action was brought seeking damages for wrongful death and personal injury arising from collision between two skiffs. The United States District Court for the District of Alaska, James A. von der Heydt, Chief Judge,

entered partial summary judgment for owners of one of the skiffs and to the vessel, and appeal was taken. Following en banc determination of whether question of state law was reviewable under de novo standard, 739 F.2d 1395, the Court of Appeals, Boochever, Circuit Judge, held that: (1) Alaska statute imposing liability on owner of watercraft devoted to recreational pursuit applied to otherwise commercial skiff being used for recreation at time of collision; (2) employer of operator of one of the skiffs was not liable under respondeat superior since the operator was not acting within scope of his employment when collision occurred; and (3) claim against vessel could not be determined on summary judgment in light of material issue of fact.

Affirmed in part, reversed in part and remanded.

Gerald W. Markham, Kodiak, Alaska, for plaintiffs-appellants.

James M. Powell, Kenneth F. Brittain, Hughes, Thorsness, Gantz & Powell, Anchorage, Alaska, for defendants-appellees.

Appeal from the United States District Court for the District of Alaska.

Before CANBY, BOOCHEVER, and NORRIS, Circuit Judges.

BOOCHEVER, Circuit Judge:

Plaintiffs Churchill and Carlough sue for wrongful death and personal injury arising from the navigation of three skiffs, two of which collided. The district court granted partial summary judgment to the Johnsons, owners of one of the skiffs, and to their vessel, and entered

judgment pursuant to Fed.R.Civ.P. 54(b). Plaintiffs appeal arguing that the owners are liable, alternatively, under an Alaska statute, under the theory of respondeat superior for the acts of their crewman, or for failure to maintain the skiff. Plaintiffs also contend that the Johnsons' vessel, F/V Supersonic, is liable *in rem* regardless of the Johnsons' liability *in personam*.[1] Because we find that Alaska Owner's Civil Liability statute may be applicable we reverse the partial summary judgment and remand for further consideration of the claims.

FACTS

A collision of two skiffs occurred in the channel between Near Island and Kodiak Island, Alaska in the early morning hours of June 30, 1979. One craft, operated and occupied only by defendant Panamaroff (the Panamaroff skiff) was headed in a northeasterly direction. The other craft, operated by Russell McLinn (the McLinn skiff), was headed in a southerly direction. The collision of these skiffs resulted in the death of Patrick Churchill and injury to plaintiff Dale Carlough, both of whom were

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[1] Plaintiffs' brief also addresses issues relating to the Johnsons' petition for limitation of liability and relating to a joint venture between Chichenoff and Panamaroff. Because the district court found that the Johnsons were not liable *in personam* as a matter of law, it did not decide the limitation of liability issue. We do not believe that it is appropriate for us to address it initially.

The joint venture issue is not properly before this court. That issue pertains to the liability of Chichenoff as to which there has been no final appealable judgment. 28 U.S.C. § 1291 (1976); *Chacon v. Babcock*, 640 F.2d 221 (9th Cir.1981).

riding in the McLinn skiff. At the time of the collision, defendant Michael Chichenoff was operating a similar seine skiff (the Chichenoff skiff) in approximately the same direction and approximately the same speed as the Panamaroff skiff. The Chichenoff skiff was to the right of the Panamaroff skiff at a distance variously estimated to be from 8 yards to as much as 100 yards. There was no contact between the Chichenoff skiff and either of the other skiffs. None of the skiffs had night running lights and all were allegedly traveling at high speeds in violation of local ordinances.

Mr. Panamaroff had been experiencing engine difficulties and was headed home to Ouzinkie when the accident occurred. Defendant Chichenoff had agreed to accompany his friend Panamaroff through the channel to insure that he did not become stranded if his engine malfunctioned.

Chichenoff operated a seine skiff of the salmon fishing vessel F/V Supersonic; defendants Jack and Gilbert Johnson own both the fishing vessel and skiff. The McLinn skiff had been used for a similar purpose in conjunction with the F/V Fjord, owned by William McLinn, father of Russell McLinn. The fishing vessels were moored in Kodiak during the temporary closure of the salmon fishery.

Plaintiffs, Dale Carlough and Frank Churchill, father of decedent Patrick Churchill, brought suit in admiralty against Russell McLinn, William McLinn, Panamaroff, Chichenoff, Gilbert Johnson and Jack Johnson *in personam*, and against the F/V Fjord and the F/V Supersonic *in rem*. We are concerned in this appeal only with the suit

against the Johnsons and the F/V Supersonic. In the district court, the Johnsons moved for summary judgment as to their liability and that of their vessel, the F/V Supersonic, or in the alternative, for limitation of liability to the value of the Chichenoff skiff or barring that, to the value of the F/V Supersonic. Plaintiffs Carlough and Churchill filed a cross-motion for summary judgment on the same issues. The district court granted the Johnsons' motion for summary judgment and denied the other motions. Plaintiffs now appeal the grant of summary judgment to the Johnsons and the F/V Supersonic.

*Standard of Review*

In reviewing a grant of summary judgment, the appellate court's task is identical to that of the trial court. Viewing the evidence in the light most favorable to the party against whom summary judgment is granted, the appellate court must determine whether the trial court correctly found that there was no genuine issue of material fact and that the moving party was entitled to judgment as a matter of law. *Heiniger v. City of Phoenix*, 625 F.2d 842, 843 (9th Cir.1980).

One of the issues in this case hinged on the district court's interpretation of an Alaska statute. Our review of the court's interpretation was contingent on whether we applied a de novo or clearly erroneous standard, about which there was some confusion in this court's prior decisions. to clarify the appropriate standard, we requested en banc consideration, and a majority of the judges of this court voted to hear the matter en banc. The en banc court determined that "questions of state law are

reviewable under the same independent de novo standard as are questions of federal law". *In re Complaint of McLinn*, 739 F.2d 1395 at 1397 (9th Cir.1984) (en banc).

*Discussion*

Liability in collision cases, such as the present case, is predicated on fault. A non-colliding vessel or its owner may be at fault if some negligence of its crew or deficiency in the vessel brings about an accident between two other vessels. G. Gilmore & C. Black, *The Law of Admiralty* § 7-2, at 486 (2d ed. 1975); J. Griffin, *The American Law of Collision* § 223 (1949). Liability *in rem* may be based on negligent navigation by persons lawfully in possession of a vessel, J. Griffin, *supra*, § 244, at 557, or the violation of some rule or statute prescribing necessary equipment. G. Gilmore & C. Black, *supra*, § 7-3. Liability *in personam* of the vessel owner rests on the doctrine of *respondeat superior*. J. Griffin, *supra*, § 243.

In the present case, plaintiffs Churchill and Carlough assert liability *in rem* and *in personam* based on each of the above delineated theories. They also assert *in personam* liability against the Johnsons under an Alaska statute.

*I. Alaska Owner Responsibility Statute*

Churchill and Carlough seek to impose liability upon the Johnsons under an Alaska statute, Alaska Stat. § 05.25.040 (1981). That section reads in pertinent part:

> The owner of a watercraft is liable for injury or damage caused by the negligent operation of his watercraft whether the negligence consists of a

> violation of a state statute, or neglecting to observe ordinary care in the operation of the watercraft as the rules of common law require. The owner is not liable, however, unless his watercraft is used with his express or implied consent . . . .

The district court held that whether Chichenoff had the Johnsons' implied consent to use the Chichenoff skiff and was negligent in its operation were questions of fact unsuited for resolution on summary judgment. The court held as a matter of law, however, that section 05.25.040 did not impose liability upon the Johnsons because the Chichenoff skiff was not a "watercraft" within the meaning of the statute. "Watercraft" is defined as:

> . . . every description of vessel, other than a seaplane on the water, used or capable of being used as a means of transportation on water and devoted to recreational pursuits unless otherwise expressly provided in this chapter; and excepting vessels having a valid marine document . . . .

Alaska Stat. § 05.25.100(4) (1981). The district court held that under the plain meaning of section 05.25.100(4), the Chichenoff skiff was not "devoted to recreational pursuits" because it was a seine skiff, "devoted to use as a part of the equipage of the F/V SUPERSONIC for use in commercial salmon fishing."

A. *Certification*

After filing this appeal, plaintiffs for the first time moved to certify issues concerning the interpretation of Alaska Stat. § 05.25.040 (1981) to the Alaska Supreme Court pursuant to Alaska Appellate Rule 407. Use of

certification rests in the sound discretion of this court. *Lehman Bros. v. Schein*, 416 U.S. 386, 391, 94 S.Ct. 1741, 1744, 40 L.Ed.2d 215 (1974).

*Lehman Bros.*, however, provides no clear standards as to when certification should be used. This circuit has used the certification procedure but has not articulated its standards for doing so. *See Queets Band of Indians v. State of Washington*, 714 F.2d 1008, 1009 (9th Cir.1983); *Estate of Madsen v. Commissioner of Internal Revenue*, 659 F.2d 897, 899 (9th Cir.1981); *Mutschler v. Peoples National Bank*, 607 F.2d 274, 278-79 (9th Cir.1979). The Fifth Circuit has indicated that the question certified must be close, and the issue must be important to the state in terms of comity. The certifying court also should consider the possible delays involved and whether the legal issue can be framed to produce a helpful response by the state. *Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 275 (5th Cir.), *cert. denied*, 429 U.S. 829, 97 S.Ct. 88, 50 L.Ed.2d 92 (1976); *see also* 1A J. Moore, W. Taggart, A. Vestal & J. Wicker, *Moore's Federal Practice*, ¶ 0.203[5] (2d ed. 1981).

We believe that particularly compelling reasons must be shown when certification is requested for the first time on appeal by a movant who lost on the issue below. Ordinarily such a movant should not be allowed a second chance at victory when, as here, the district court employed a reasonable interpretation of state law. In the present case, the issue sought to be certified is only one of many involved in the litigation.[2]

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[2] We judicially note that a request for certification was made to the district court in *Queets Band of Indians* although no

(Continued on following page)

It also is not clear that certification would be proper under Alaska Appellate Rule 407. That rule allows certification of issues of law which may be determinative of the cause pending before the certifying court. The Alaska statute in question imposes liability on vessel owners only when the person operating the vessel does so with the express or implied consent of the owner. There is still an unresolved factual issue of whether Chichenoff had the Johnsons' consent. Thus the legal issue of the application of the Alaska statute would not be determinative unless the Alaska Supreme Court interpreted the statute in the same manner as did the district court. We do not believe that certification with its delays would be sufficiently helpful in this situation, and deny plaintiffs motion to certify.

B. *Applicability of the Statute*

Plaintiffs Churchill and Carlough argue that the plain language of the statute does not dictate the interpretation adopted by the district court. They focus on the use of the skiff at the time of the accident, arguing that when the collision occurred, the Chichenoff skiff was "devoted to" recreation. The Johnsons argue that "devoted to" refers to the general use of the skiff, and because it was equipage of a commercial fishing boat, the F/V Supersonic, it was "devoted to" commercial, not recreational, pursuits. The

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(Continued from previous page)

mention is made of that fact in the court's opinion. That case is also illustrative of instances when the only issue involved is a construction of a state statute.

relevant sections of the Alaska statute have not been interpreted by the Alaska Supreme Court and the legislative history is sparse. The plain language of section 05.25.100(4) is subject to either party's interpretation.

Churchill and Carlough cite *Otis Lodge, Inc. v. Commissioner of Taxation*, 295 Minn. 80, 206 N.W.2d 3 (1972), in support of their interpretation. In *Otis Lodge*, the court interpreted the phrase "devoted to" in a tax regulation to mean "chiefly," as opposed to "wholly." *Id.*, 206 N.W.2d at 7. Even if we accept the *Otis Lodge* construction, we do not believe it requires an interpretation that section 05.25.040 applies to the present situation. Plaintiffs do not allege that the Chichenoff skiff was even used "chiefly" for recreational purposes. Rather, they argue that the skiff was used for recreational purposes at the time of the accident.

In the absence of history of section 05.25.040 we are left to speculate as to the legislature's purpose in limiting application of the statute to vessels "devoted to recreational pursuits." The statute was passed in 1961, and at that time there would have been doubt as to the legality of a state law affecting the liability of owners of commercial vessels, because of the strong need for uniformity in federal maritime law. *See Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216, 37 S.Ct. 524, 529, 61 L.Ed. 1086 (1917); *Alaska Industrial Board v. Alaska Packers Ass'n*, 186 F.2d 1015, 1016-17 (9th Cir.1951); 1 E. Jhirad, A. Sann, B. Chase, *Benedict on Admiralty* § 112, at 7-35 (7th ed. 1983). Thus, one possibility is that the Alaska legislature intended as expansive an imposition of liability as was constitutionally permissible. Under this theory, a vessel devoted

to recreational pursuits at the time of an accident would be covered if within the state's power.

In *Adams v. Montana Power Company*, 528 F.2d 437, 439 (9th Cir.1975), we held that neither non-commercial fishing nor pleasure boating constituted commerce for the purpose of admiralty jurisdiction. We noted that "[i]n the absence of commercial activity present or potential there is no ascertainable federal interest justifying the frustration of legitimate state interests." We concluded that there was no federal maritime jurisdiction over a non-commercial fishing boat accident in an intrastate waterway obstructed at both ends by impassable dams. In the case before us there is no question as to the court's admiralty jurisdiction over a boating accident in the navigable waters of Kodiak harbor. Nevertheless, *Adams* expresses the concern with a state's limited power over commercial maritime activity that may well have restricted the scope of Alaska's 1961 safe boating statute.

This concern is further suggested by the fact that the statute, as initially enacted, applied only to inland waters, defined as "the water in any lake or river or stream within the territorial limits of this state." 1961 Alaska Sess.Laws ch. 63, § 2(2). It was not until 1976 that the act was amended to include coastal waters "within the territorial limits or under the jurisdiction of the state." 1976 Alaska Sess.Laws ch. 60 § 2.

Moreover, a liberal construction of the statute is indicated by its declaration of policy:

> It is the policy of this state to promote safety for persons and property in and connected with the use, operation and equipment of vessels in recreational pursuits in inland waters

> and to promote uniformity of laws relating thereto.

Alaska Stat. § 05.25.050. The purpose is not to promote safety of "recreational vessels" but the operation of "vessels in recreational pursuits." This indicates an intent to include any vessel not expressly excluded by the terms of the statute, if used for recreation, whether or not its usual function is commercial activity.

Finally we note that the definition of watercraft on which the Johnsons rely excerpts from its provisions "vessels having a valid marine document issued by the United States," not vessels customarily used commercially. Alaska Stat. § 05.25.100(4). Under the doctrine of expressio unius est exclusio alterius, *see* 2A C. Sands, *Sutherland Statutory Construction* § 47.23, at 123 (4th ed. 1973), non-documented vessels, such as the seine skills here involved, would not be excepted from the scope of the statute. *Cf. Andrus v. Glover Construction Co.*, 446 U.S. 608, 616-17, 100 S.Ct. 1905, 1910-11, 64 L.Ed.2d 548 (1980) (where Congress explicitly enumerates certain exceptions to a statute, additional exceptions are not to be implied).

A close question is presented, and we cannot say that the learned trial judge clearly erred. Nevertheless, applying a de novo standard of review, we conclude that the statutory provisions were intended to cover non-documented vessels temporarily devoted to recreational pursuits, even though generally used commercially.

*II. Respondeat Superior Liability*

Churchill and Carlough argue that the Johnsons are liable for Chichen[illegible]s conduct under the doctrine of

*respondeat superior.* The Johnsons are not liable for Chichenoff's alleged negligence unless Chichenoff was acting within the scope of his employment when the accident occurred. An employee's conduct is within the scope of employment if it is of the kind he was employed to perform, it occurs substantially within the authorized time and space limits, and it is actuated, at least in part, by a purpose to further the master's business. *See Oregon v. Tug Go-Getter,* 468 F.2d 1270, 1275 (9th Cir.1972); *Restatement (Second) of Agency* § 228 (1958). The district court held as a matter of law that Chichenoff was not acting within the scope of his employment because he was using the skiff for his own, not his master's, business. The district court also found undisputed that Chichenoff's immediate superior did not expressly authorize Chichenoff's use of the skiff on the night of the accident.

The plaintiffs argue that the district court erred on two grounds in holding that Chichenoff was acting outside the scope of his employment. First, they contend that the Johnsons' purpose was served because Chichenoff was coming to the aid of a fellow fisherman, as is the custom in the fishing community. Sometime in the future, plaintiffs argue, the Johnsons will be benefited by aid in return. Second, they argue that Chichenoff's pursuit of recreation is part of his employment as a boost to his morale, as a seaman's shore leave is a part of the business of sailing.

The first argument plainly lacks support. The cases plaintiffs cite in which courts have been willing to recognize a duty of seamen or fishermen to come to the aid of others all involve salvage situations in which failure to aid would have resulted in immediate danger of loss of

life or property. *See Allen v. Seacoast Products, Inc.*, 623 F.2d 355 (5th Cir.1980); *The Judith Lee Rose, Inc. v. The Clipper*, 169 F.Supp. 885 (D.Mass.1959); *The Star*, 53 F.2d 890 (W.D.Wash.1931). These cases recognize the duty as one to give aid to others in distress or peril. No such perilous circumstances or immediacy of danger existed in the present case. We refuse to expand the duty to the facts before us.

We also find inapposite those cases cited by plaintiffs in which truck drivers, who aided people in distress while driving along their business routes in the regular course of business, were held to be acting within the scope of their employment. *See Campbell Baking Co. v. Clark*, 175 Ark. 899, 1 S.W.2d 35 (1927); *Jack Cole Co. v. Hoff*, 274 S.W.2d 658 (Ky.App.1954); *Boalbey v. Smith*, 339 Ill.App. 466, 90 N.E.2d 238 (1950). Plaintiffs do not allege in the present case that Chichenoff was pursuing his master's regular course of business or following a regular business route at the time he gave aid to Panamaroff.

In support of the second argument, plaintiffs cite *Fruit v. Schreiner*, 502 P.2d 133 (Alaska 1972) and *Murphey v. United States*, 179 F.2d 743 (9th Cir.1950). The employee in *Fruit* was attending his employer's sales convention and was involved in an accident which occurred when he drove to join out-of-state guests after the business meetings had concluded. The Alaska Supreme Court held that the employee was furthering a purpose of his master. The employer encouraged the employee to socialize with the guests and benefit from their work experience, and the employee's actions were motivated at least in part by this purpose. *Fruit*, 502 P.2d at 142. In *Murphey*, the employer's purpose was held to have been served when a soldier

drove an army truck on a recreational excursion. At the time of the accident, the soldier was authorized by a commanding officer to drive the truck for pleasure and was seeking a specified entertainment that would improve military morale. *Murphey,* 179 F.2d at 746.

*Fruit* and *Murphey* are distinguishable. In each case, the employee received authorization or encouragement from the employer to make social contact or pursue recreation. *See also Williams v. United States,* 248 F.2d 492 (9th Cir.1957). Here plaintiffs do not allege or offer evidence that the Johnsons encouraged Chichenoff to seek recreation in their skiff.

We find *In Re Vest,* 116 F.Supp. 901 (N.D.Cal.1953), persuasive. In *Vest,* the court held that an employer was not liable under the doctrine of respondeat superior when his employee took the employer's fishing boat out at night on a sightseeing tour without express authorization. The court held that the employee had been hired solely to run the boat on daytime fishing trips as scheduled and ordered by the employer. *Id.* at 902. Chichenoff was hired by the Johnsons to work with the F/V Supersonic and its skiff as a fisherman. In the absence of any allegation that they encouraged Chichenoff to pursue recreation in their skiff, we agree with the district court that Chichenoff was not serving a purpose of the master at the time of the collision.

*III. In Rem Liability of the F/V Supersonic*

Churchill and Carlough argue that even if the district court properly dismissed the suit against the Johnsons, it

was error to dismiss the *in rem* suit against the F/V Supersonic. They argue that a vessel may be held liable *in rem* for faults in her navigation committed by any persons lawfully in possession of her. J. Griffin, *supra*, § 244, at 557; *The Barnstable*, 181 U.S. 464, 467, 21 S.Ct. 684, 685, 45 L.Ed. 954 (1901); *California v. Italian Motorship Ilice*, 534 F.2d 836, 841 (9th Cir.1976).[3] The district court found

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[3] The district court found it undisputed that the Johnsons' skiff operated by Chichenoff did not have proper operating lights, in violation of, *inter alia*, 46 C.F.R. § 25.05-1 (1982). This violation establishes statutory fault on the part of the vessel, and serves as the basis of *in rem* liability. Once statutory fault is established, the rule announced in *The Pennsylvania*, 86 U.S. (19 Wall.) 125 [22 L.Ed. 148] (1874), puts the burden of exoneration on the vessel to show "not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been." *Id.* at 136 [22 L.Ed. 148].

The district court did not address this issue in regard to *in rem* liability of the skiff or the F/V Supersonic. Rather, it addressed the lack of lights as pertains to the negligence of Chichenoff. The district court held as a matter of law that the lack of lights was not a cause of the collision. We agree with this conclusion. Therefore, the record reflects a proper ground for dismissing this statutory fault as a basis for *in rem* liability. *See Calnetics Corp. v. Volkswagen of America, Inc.*, 532 F.2d 674, 682 (9th Cir.), *cert. denied*, 429 U.S. 940, 97 S.Ct. 355, 50 L.Ed.2d 309 (1976).

Plaintiffs also argue that the Johnsons should be held liable *in personam* for their failure to equip their skiff with lights. Plaintiffs contend that the Johnsons knew the skiff was without lights and that the skiff was being used at night, therefore they owed a duty to others either to equip their skiff properly or to prohibit its use at night. The district court did not expressly address or dispose of this issue below. Because we believe that the district court properly found that the failure of the skiff to have lights was not a cause of the accident this theory must fail for lack of causation.

triable issues of fact concerning whether Chichenoff was negligent and had the implied consent of the Johnsons to use the skiff in activities not involving his duties as their employee. If Chichenoff was in lawful possession of the skiff any negligence in its navigation is imputable to the skiff, and possibly to the F/V Supersonic, in an *in rem* action regardless whether he acted as the Johnson's agent predicating *in personam* liability.

The Johnsons contend that the court lacks jurisdiction over the vessel because the complaint was not verified as required by Supplemental Rule C(2) of the Federal Rules of Civil Procedure and process was never served on the vessel as provided in Supplemental Rule C(3). This court has held that service of process on the vessel by a warrant of arrest is an essential prerequisite for *in rem* jurisdiction. *Alyeska Pipeline Service Co. v. Bay Ridge*, 703 F.2d 381, 384 (9th Cir.1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 3526, 82 L.Ed.2d 852 (1984); *Yokahama Specie Bank v. Wang*, 113 F.2d 329, 331 (9th Cir.), *cert. denied*, 311 U.S. 690, 61 S.Ct. 71, 85 L.Ed. 446 (1940). The Johnsons' failure to raise these issues below, however, may have constituted a waiver of the jurisdictional defects, or a consent to the jurisdiction of the court, at least so far as their interest in the vessels is concerned. *See Crane v. Gas Screw Happy Pappy*, 367 F.2d 771, 773-74 (7th Cir.1966), *cert. denied, Borrowdale v. Reuland*, 386 U.S. 959, 87 S.Ct. 1029, 18 L.Ed.2d 108 (1967); *Reed v. S.S. Yaka*, 307 F.2d 203, 204 (3d. Cir.1962), *rev'd on other grounds*, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed.2d 448 (1963); *cf. Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19, 80 S.Ct. 1470, 4 L.Ed.2d 1540 (1960) (apparently accepting the owner's letter of agreement to be liable as sufficient to invoke *in rem* jurisdiction). *But see Alyeska*,

703 F.2d at 381, wherein release of the vessel from the custody of the court was held an absolute bar to *in rem* jurisdiction. Because as indicated below we find it necessary to remand for further consideration of the award of summary judgment, it is unnecessary for us to resolve this issue. On remand, plaintiffs may seek to cure the jurisdictional defects by any means the district court finds appropriate.

Assuming that the court had jurisdiction over the vessel, another unresolved issue is whether fault in the navigation of a skiff which is part of the equipage of another vessel gives rise to a maritime lien against the main vessel as well as the skiff.

To grant a motion for summary judgment, the district court must find that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The district court's otherwise thorough and well reasoned Memorandum and Order is unilluminating as to either the relevant facts or law concerning plaintiffs' *in rem* claim against the F/V Supersonic, which was dismissed without discussion. In this posture of the case, we are unable to determine whether summary judgment was properly granted. Under similar circumstances, the Supreme Court has remanded a case for further proceedings. *See Carter v. Stanton*, 405 U.S. 669, 671-74, 92 S.Ct. 1232, 1234, 31 L.Ed.2d 569 (1972) (per curiam). Therefore, we vacate the district court's dismissal of the *in rem* action against the F/V Supersonic and remand for proceedings consistent with this opinion. That portion of the district court's opinion granting summary judgment to the Johnsons is also reversed.

AFFIRMED in part, REVERSED in part and REMANDED.

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## APPENDIX C

**Carlissa CHURCHILL, As the Informal Administrator of the Estate of Patrick Churchill; and Dale Carlough; Plaintiffs-Appellants,**

**v.**

**The F/V FJORD, her engines, tackle, apparel, appliances, equipment, apparatus and furniture, et al.; William McLinn, owner and operator of said F/V FJORD; Russell McLinn and David Panamarioff; Defendants-Appellees.**

**In the Matter of the Complaint of William McLINN, as owner of the F/V FJORD, her engines, tackle, boilers and equipment, for exoneration from, or limitation of liability.**

**In the Matter of the Complaint of Gilbert Jack JOHNSON and Jack Stewart Johnson, as owners of the F/V SUPERSONIC, her engines, tackle, boilers and equipment, and as owners of one certain Beck 15 foot fiberglass skiff, her engine, tackle and equipment, for limitation of liability.**

No. 86-4178.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Nov. 5, 1987.
Decided Sept. 14, 1988.

Action was brought seeking damages for wrongful death and personal injury arising from collision of two skiffs. Following remand, 744 F.2d 677, the United States District Court for the District of Alaska, James A. von der Heydt, J., entered judgment in favor of fishing vessel from which one of the skiffs was operated, and its owner. Plaintiffs appealed. The Court of Appeals, Cynthia

Holcomb Hall, Circuit Judge, held that: (1) evidence supported finding that crew member operating fishing vessel's skiff was not in lawful possession thereof, so that the vessel was not liable in rem for crew member's negligence; (2) Alaska statute with respect to liability of owner of watercraft was preempted by federal maritime law concerning limitation of liability; (3) there was no clear error in finding that skiff's lack of proper operating lights was not a cause of the accident; (4) there was no clear error in finding that vessel owner was not liable under theories of negligent entrustment or family purpose; but (5) district court incorrectly compared each plaintiff's comparative negligence with the other, rather than separately with the defendants.

Affirmed in part, reversed in part, and remanded.

Gerald W. Markham, Kodiak, Alaska, for plaintiffs-appellants.

Robert L. Eastaugh, Delaney, Wiles, Hayes, Reitman & Brubaker, Anchorage, Alaska, for defendants-appellees.

Appeal from the United States District Court for the District of Alaska.

Before HUG,* NORRIS and HALL, Circuit Judges.

CYNTHIA HOLCOMB HALL, Circuit Judge:

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*Judge Hug was drawn to replace Judge Anderson, who died while this appeal was pending. Judge Hug has read the briefs, reviewed the record and listened to the tape of oral argument.

Plaintiffs-appellants Churchill and Carlough sue for wrongful death and personal injury arising from the navigation of three skiffs, two of which collided. The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1333(1) and exercised pendent jurisdiction over plaintiffs' state law claim. The court, after a bench trial, entered judgment in the liability phase of the trial in favor of defendants-appellees William McLinn and the F/V Fjord. Appellants appeal to this court, asserting numerous grounds for reversal. We affirm in part, reverse in part, and remand.[1]

I

A collision of two skiffs occurred outside the entrance to the channel between Near Island and Kodiak Island, Alaska at approximately 1:20 a.m. on June 30, 1979. The channel generally runs in a north-south direction. One craft, operated and occupied only by David Panamarioff (the Panamarioff skiff) was headed in a northerly direction. The other craft, operated by Russell McLinn (the McLinn skiff), was headed in a southerly direction. Russell McLinn was a crew member of the F/V Fjord and the eighteen year old son of the Fjord's owner and master, William McLinn. Several days prior to the collision, William McLinn and the rest of the Fjord's crew flew to Seward on the mainland. Russell stayed behind, and on the night of June 30th he used the skiff to attend a

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[1] We do not decide whether appellants were denied their right to a jury trial because we hold that federal law preempts appellants' pendent state law claim brought under Alaska Statutes § 05.25.040.

beach party on another island. Five others were riding in the McLinn skiff on its return from the party when the collision occurred. The McLinn skiff struck the Panamarioff skiff, resulting in the death of Patrick Churchill and injury to plaintiff Dale Carlough, both of whom were riding in the McLinn skiff. Russell McLinn was found to be intoxicated with alcohol and probably marijuana at the time of the accident.

At the time of the collision, Michael Chichenoff was navigating a similar seine skiff (the Chichenoff skiff) in approximately the same direction and at approximately the same speed as the Panamarioff skiff. Three passengers occupied the Chichenoff skiff: Lori Chichenoff, Walter Haakanson and Dan Woods. The Chichenoff skiff was to the right of the Panamarioff skiff at a distance variously estimated to be from eight yards to as much as 100 yards.

Panamarioff had been experiencing engine difficulties and was headed home to the nearby village of Ouzinkie on Spruce Island when the accident occurred. Chichenoff had agreed to accompany his friend Panamarioff through the channel of insure that Panamarioff would not be stranded should his engine malfunction. There was no contact between the Chichenoff skiff and either of the other skiffs. None of the skiffs had night running lights and all were allegedly traveling at high speeds in violation of local ordinances.

Chichenoff operated a seine skiff of the salmon fishing vessel F/V Supersonic. The McLinn skiff was used for a similar purpose in conjunction with the F/V Fjord, a purse seiner. The fishing vessels were moored in Kodiak

during the temporary closure of the salmon fishery. Plaintiff's suit against the F/V Supersonic and her owners was settled prior to trial.[2]

The district court entered an order granting summary judgment to Churchill and Carlough against Panamarioff and Russell McLinn jointly and severally, with the application of a specified comparative negligence formula and with the damages to be determined in a subsequent trial. The court ordered dismissal of the plaintiffs' claim for punitive damages and dismissal of the claims against William McLinn and the F/V Fjord. The court directed the entry of final judgment under Fed.R.Civ.P. 54(b).

II

A district court's findings of facts are reviewed under the clearly erroneous standard. Fed.R.Civ.P. 52(a); *LaDuke v. Nelson*, 762 F.2d 1318, 1321 (9th Cir.1985). Under the clearly erroneous standard of review an appellate court must accept the lower court's findings of fact unless upon review the appellate court is left with the definite and firm conviction that a mistake has been committed. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 541-42, 92 L.Ed. 746 (1948); *Dollar Rent A Car of Washington, Inc. v. Travelers Indemnity Co.*, 774 F.2d 1371, 1374 (9th Cir.1985). Questions of law are reviewed *de novo*. *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984).

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[2] Plaintiff's suit against defendant-appellee David Panamarioff was settled while this appeal was pending.

III

Appellants assert that the F/V Fjord is liable *in rem* for the torts of Russell McLinn in his operation of the Fjord's skiff. To establish the F/V Fjord's *in rem* liability, appellants must show that the skiff is part of the F/V Fjord's "equipage" and that Russell McLinn was "in lawful possession" of the skiff. *See The Barnstable,* 181 U.S. 464, 467, 21 S.Ct. 684, 685-86, 45 L.Ed.954 (1901) ("the law in this country is entirely well settled that the ship itself is to be treated in some sense as a principal, and as personally liable for the negligence of anyone who is lawfully in possession of her, whether as owner or charterer"); *Complaint of McLinn,* 744 F.2d 677, 680 (9th Cir.1984); G. Gilmore & C. Black, *The Law of Admiralty,* § 9-18 at 615 (2d ed. 1975) ("Gilmore & Black").

The district court dismissed appellants' *in rem* claim against the Floyd, finding that no credible evidence adequately supported plaintiffs' allegations. In order to conclude that the Fjord was not liable *in rem,* the district court must have found either that the skiff is not part of the Fjord's equipage or that Russell McLinn was not in lawful possession, or both. Thus, we may affirm the district court's conclusion of no *in rem* liability if either possible implicit finding is not clearly erroneous.

Because appellants must show both that the skiff is part of the equipage of the F/V Fjord and that Russell McLinn was in lawful possession of the skill to establish *in rem* liability, we need not reach the equipage question in order to affirm the district court's ruling that there is

no *in rem* liability.[3] We affirm the district court solely on the basis that the evidence in the record supports an implicit finding that Russell McLinn was not in lawful possession of the Fjord's skiff. *See Beezley v. Fremont Indemnity Co.*, 804 F.2d 530, 530 n. 1 (9th Cir.1986), *cert. denied* ___ U.S. ___, 107 S.Ct. 1610, 94 L.Ed.2d 796 (1987) ("we may affirm the district court on any basis fairly supported by the record").

Under the doctrine of *in rem* liability, charterers, pilots and stevedores are considered to be in lawful possession, whereas pirates, mutineers and "like" people are not. Gilmore & Black, § 9-10 at 601. As discussed by Gilmore & Black, the *Barnstable* rule of lawful possession should be viewed as creating liability where the owner of the vessel has entrusted control to a third party. Gilmore & Black, § 9-18 at 621; *see Complaint of McLinn*, 744 F.2d at 685 (implying that vessel owner's consent to the use of the vessel's skiff in activities not involving the employee's duties is relevant to a finding of lawful possession); *Cavcar Co. v. M/Z Suzdal*, 723 F.2d 1096, 1101 (3d Cir.1983). Thus, the rule requires that the vessel's owner give some degree of consent or authorization to the third party.

Despite Russell McLinn's status as a member of the Fjord's crew, the record supports the district court's implicit finding that he was not in lawful possession of the

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[3] The district court did not specifically decide whether the McLinn skiff was part of the equipage of the F/V Fjord, although it did hold that the Chichenoff skiff was part of the equipage of the F/V Supersonic. Although there is no indication in the record that the district court did not consider the McLinn skiff to be part of the equipage of the Fjord, the parties are in dispute on this issue and we need not resolve it.

skiff. His use of the skiff was much more like that of a mutineer, pirate, or thief than a charterer, pilot, or stevedore. It is clear from the record that Russell did not have any authority from his father, William, to use the skiff. Use of the skiff was highly regulated and Russell required his father's permission to use the skiff. No one other than William McLinn possessed the authority to allow Russell to use the skiff.

When leaving the Fjord for his flight to Seward, both William McLinn and Joe Borg, the skiffman on the Fjord, told Russell to stay out of the skiff and not to touch the skiff. William admonished his son that he saw no reason for Russell to use the skiff while he was gone. In addition, Russell's personal, recreational use of the skiff at night while under the influence of alcohol and probably marijuana, contrary to all expectations for the skiff's use, supports the district court's implicit conclusion that Russell was not in lawful possession of the skiff.

Although the district court did not make an express finding on the issue of lawful possession in rejecting appellants' *in rem* claim, the evidence in the record supports an implicit finding that Russell was not in lawful possession of the McLinn.[4] Therefore, the Fjord is not

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[4] After the district court entered its findings of fact and conclusions of law, appellants twice moved the court to amend its findings and judgment on the issue of lawful possession. The district court again was presented with both the appellants' and the appellees' evidence on the issue. Appellees' evidence at trial consisted primarily of the testimony of William McLinn and Joe Borg, but also included testimony by Russell McLinn.

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liable *in rem* for Russell McLinn's negligence in operating the skiff.

IV

The district court's dismissal of appellants' claim under Alaska Statutes § 05.25.040 is reviewed *de novo*. *In re McLinn*, 739 F.2d 1395, 1397 (9th Cir.1984) (en banc). The court below dismissed the claim on the basis of federal preemption. Section 05.25.040 provides:

> the owner of a watercraft is liable for injury or damage caused by the negligent operation of his watercraft. . . . The owner is not liable, however, unless his watercraft is used with his express or implied consent. It is presumed that his watercraft is being operated with the knowledge and consent of the owner, if at the time of the injury or damage, it is under the control of his . . . son.

"Watercraft" is defined by AS § 05.25.100(4) to mean "every description of vessel . . . used or capable of being used as a means of transportation on water and devoted to recreational pursuits."

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By refusing to amend its findings, it is clear that the district court again rejected appellants' claim that Russell was in lawful possession of the skiff. Consequently, we conclude that the district court necessarily accorded greater weight to appellees' evidence. We will not second-guess that assessment of credibility. *United States v. Gomez*, 846 F.2d 557, 560-61 (9th Cir. 1988) ("We cannot second-guess trial court findings that depend on explicit or implicit credibility assessments unless the findings are unsupported by the record.").

The statute applies to all state waters, AS § 05.25.100(5), and therefore embraces navigable waters which are subject to federal maritime statutory and common law. The district court held that AS § 05.25.040 directly conflicts with an act of Congress, the Limitation of Liability Act, 46 U.S.C. App. § 183. In addition, the district court found that AS § 05.25.040 interferes with the goal of uniformity of admiralty law. On those grounds, the court held that AS § 05.25.040 was completely preempted.

AS § 05.25.040 could impose unlimited personal liability on William McLinn beyond the liability permitted under 46 U.S.C. App. § 183. Section 183(a) limits the liability of the owner of any vessel to the amount of the interest of the owner in such vessel. In light of this court's holding in *Complaint of McLinn*, 744 F.2d at 683, it is apparent that each statute would apply to the Fjord and its skiff. It is settled doctrine that a state law that conflicts with established maritime law or federal statute will not be given effect. *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 160-61, 40 S.Ct. 438, 440-41, 64 L.Ed.2d 834 (1920); G. Gilmore & C. Black, § 1-17 at 48.

We previously held that the federal remedial scheme for wrongful death within state territorial waters preempts state law remedies. *See Nygaard v. Peter Pan Seafoods, Inc.*, 701 F.2d 77, 80 (9th Cir.1983); *Nelson v. United States*, 639 F.2d 469, 473 (9th Cir.1980). Inasmuch as AS § 05.25.040 conflicts with 46 U.S.C. App. § 183 in the instant case, the federal law must prevail.

Moreover, we find that AS § 05.25.040 is completely preempted by federal law. There is a strong need for

uniformity in federal maritime law, *see Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216, 37 S.Ct. 524, 529, 61 L.Ed. 1086 (1917); *Complaint of McLinn*, 744 F.2d at 682, and AS § 05.25.040 is destructive of this uniformity. Maritime law, through long experience, has been concerned with the limitation of liability. *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 270, 93 S.Ct. 493, 505, 34 L.Ed.2d 454 (1972). AS § 05.25.040 would impose different liabilities depending on the type of vessel, its particular use at the time of the negligent act giving rise to liability under section 05.25.040, and its location.

The Supreme Court in *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 102 S.Ct. 2654, 73 L.Ed.2d 300 (1982), stated that "the smooth flow of maritime commerce is promoted when all vessel operators are subject to the same duties and liabilities." *Id.* at 676, 102 S.Ct. at 2659. The Court in *Foremost* found untenable a similar system of liability which AS § 05.25.040 creates, a local rule of liability in excess of that permitted by federal maritime law. *Id.*

AS § 05.25.040 simply imposes a greater sanction upon commercial vessel owners than federal law allows. For that reason, we affirm the district court's ruling that federal law completely preempts AS § 05.25.040. *See Nygaard v. Peter Pan Seafoods, Inc.*, 701 F.2d at 80; *Nelson v. United States*, 639 F.2d at 473; *cf. Southern Pacific Co. v. Jensen*, 244 U.S. at 218, 37 S.Ct. at 529-30 (state law remedial scheme of insurance payments by vessel owners to state fund conflicts with Congressional policy of limiting liability of owners); *Paladini v. Fink*, 26 F.2d 21 (9th Cir.1928), *aff'd*, 279 U.S. 59, 49 S.Ct. 255, 73 L.Ed.2d 613 (1929) (provision of California Constitution permitting

liability of stockholders beyond that allowed by 46 U.S.C. App. § 183 is preempted).

V

It was undisputed in the court below that the McLinn skiff did not have proper operating lights, in violation of, *inter alia*, 46 C.F.R. § 25.05-1 (1982). This violation establishes statutory fault on the part of the skiff, and serves as a basis for *in rem* liability of the F/V Fjord. *See Complaint of McLinn*, 744 F.2d at 680. Once statutory fault is established, the rule of *The Pennsylvania*, 86 U.S. (19 Wall.) 125, 22 L.Ed. 148 (1873), places the burden of exoneration on appellees to show "not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been." *Id.* (19 Wall) at 136.

The district court held as a matter of law that the lack of lights was not a cause of the accident. This court reviews a finding of proximate cause, or lack thereof, for clear error. *Armstrong v. United States*, 756 F.2d 1407, 1409 (9th Cir.1985); *see Trinidad Corp. v. S.S. Keiyoh Maru*, 845 F.2d 818, 827 (9th Cir.1988) ("We review the district court's application of facts to *The Pennsylvania* rule under the clearly erroneous standard.") Testimony at trial was that the natural lighting was "dusklike," although the qualities inherent in this term were disputed by the parties. Although the McLinn skiff was leaving an area of greater darkness relative to the illumination surrounding the Panamarioff skiff, Chichenoff testified the McLinn skiff was "pretty clear" to him approximately thirty seconds prior to the collision. Haakanson, a passenger in the

Chichenoff skiff, discussed with Chichenoff the approaching McLinn skiff thirty to forty seconds prior to the collision.

Although the district judge termed Russell McLinn's testimony incredible in many major areas, Russell testified he saw the Chichenoff skiff approximately a minute before impact. Panamarioff, who was intoxicated, was distracted by his bulky outboard motor. Witnesses testified Panamarioff was looking back at his engine just before the collision. Russell McLinn also testified to this. Panamarioff himself admitted that he looked up immediately prior to the collision to see the oncoming McLinn skiff. Although the facts are disputed with respect to whether Panamarioff was viewing forward so that lights could have warned him of the closing McLinn skiff, the district court did not clearly err in refusing to so find.

In construing the rule of *The Pennsylvania*, this court has held that the vessel statutorily at fault has the burden of establishing the violation "could not reasonably be held to have been a proximate cause of the collision." *Pacific Turo Boat Co. v. States Marine Corp.*, 276 F.2d 745, 749 (9th Cir.1960). More recently, we held that "the burden imposed under *The Pennsylvania* rule is discharged by a clear and convincing showing of no proximate cause, rather than the stricter test of beyond a reasonable doubt." *Trinidad Corp.*, 845 F.2d at 825.[5] Applying this

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[5] We note that our decision in *Trinidad Corp.* reexamined *States S.S. Co. v. Permanente S.S. Corp.*, 231 F.2d 82 (9th Cir.1956). In *Permanente S.S. Corp.*, we held that the rule of *The Pennsylvania* requires the vessel statutorily at fault to "prove

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standard, the evidence supports the district court's finding that the absence of lights was not a proximate cause of the accident.[6]

VI

Although the district court did not expressly address the question whether Russell McLinn was required to blast a sound signal, the fact findings of the court below dispose of the issue.

Appellants assert that the collision actually took place within the channel between Near Island and Kodiak Island and that the vision between the approaching vessels was obscured by an intervening obstruction, a large bluff at the entrance to the Near Island channel. Because of the obstruction, appellants argue, a sound signal was

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*beyond reasonable doubt* that the collision would [nonetheless] have occurred." *Id.* at 87 (emphasis added) (quoting *Oriental Trading & Transp. Co. v. Gulf Oil Corp.*, 173 F.2d 108, 109 (2d Cir.), *cert. denied*, 337 U.S. 919, 69 S.Ct. 1162, 93 L.Ed. 1729 (1949)). We are bound by our decision in *Trinidad Corp.*, which reexamined our earlier decisions in light of subsequent Supreme Court precedent. 845 F.2d at 825 n. 5. *See, e.g. Heath v. Cleary*, 708 F.2d 1376, 1378 n. 2 (9th Cir.1983) ("Where . . . a Supreme Court decision has effectively undermined prior Ninth Circuit precedent, a [three-judge panel is] free to reexamine those earlier cases to determine their continuing validity.")

[6] We note that this court in a prior appeal also agreed with the district court on this issue with respect to Chichenoff's negligence. *Complaint of McLinn*, 744 F.2d at 684 n. 3.

required by law. 72 COLREGS (International Regulations for Preventing Collisions at Sea) 9(a), (f), or 34(e).

There is ample evidence in the record to support not only the district court's finding that the collision took place outside the channel entrance, but also that the advancing skiffs were visually aware of each other. Therefore, no intervening obstruction obscured the skiffs from their operators' field of vision and no sound signal was required.

VII

The district court held that William McLinn was not liable to plaintiffs under the doctrine of negligent entrustment. The doctrine of negligent entrustment is embodied in Restatement (Second) of Torts § 390 (1965), and both parties agree that § 390 should apply to suits in admiralty. *See PanAlaska Fisheries, Inc. v. Marine Construction & Design*, 565 F.2d 1129, 1133-34 (9th Cir.1977). Section 390 provides that one who supplies a chattel for another's use whom the supplier "knows or has reason to know" is likely to use the chattel in a manner "involving unreasonable risk of physical harm to himself and others" is subject to liability for the physical harm resulting to them. Restatement (Second) of Torts § 390. To prevail on this theory, appellants must show that William McLinn supplied the skiff directly to his son, and must have known or should have known that Russell would be likely to use the skiff in a dangerous manner. This court reviews for clear error whether a duty of care has been breached. *Eichelberger v. NLRB*, 765 F.2d 851, 856 (9th Cir.1985); *Armstrong*, 756 F.2d at 1409.

First, there is ample evidence to support the conclusion that William McLinn did not "supply" the skiff to his son for his use. As noted above, Russell McLinn did not have permission to use the skiff, and according to his father, Russell did not use the skiff in the past without his father's permission. Second, there is enough evidence in the record for the district court to find that William McLinn did not know or have reason to know that his son would operate the skiff in a harmful manner. Russell McLinn had not previously disobeyed his father on any serious matter or given his father any reason to believe he would disobey instructions not to use the skiff. Further, William McLinn had observed his son using the skiff and believed he was a competent operator. Prior to the collision, William McLinn had never seen his son drunk or under the influence of alcohol or marijuana, although the evidence at trial on this point was conflicting. In addition, William McLinn testified he was unaware of Russell's legal problems with marijuana, driving while intoxicated charges, or juvenile problems in Hawaii. The district court did not clearly err.

VIII

The district court found no creditable evidence adequately supported appellants' allegations that William McLinn was liable under the doctrine of family purpose. The evidence supports the district court's conclusion that liability could not be predicated on the family purpose doctrine. Although, as appellants assert, the bases of the court's finding may be ambiguous, there is evidence indicating that the F/V Fjord was not simply a family activity, but was part of a commercial enterprise. Further, as the

facts described above show, Russell McLinn's use of the skiff on June 30, 1979 is not consistent with any conceivable family purpose.

IX

Appellants assert that the district court erred in sustaining objections to appellants' attempts to introduce evidence concerning Russell McLinn's reputation for delinquency. Appellants argue such evidence is relevant to the issue whether William McLinn knew or should have known his son would use the skiff in a dangerous manner. Therefore, appellants contend that the district court's rejection of the negligent entrustment claim must be reversed as a result of the error. This court reviews evidentiary rulings for an abuse of discretion. *Coursen v. A.H. Robins Co., Inc.*, 764 F.2d 1329, 1333 (9th Cir.1985).

We hold that the district court did not abuse its discretion in excluding the evidence. It was clearly in the district court's discretion to decide whether the evidence appellants sought to admit was relevant under Federal Rule of Evidence 401, or outweighed by its potential prejudice and its potential for wasting the court's time Fed.R.Evid. 403. *See id*, at 1333-35, 1339-40. Further, appellants did not suffer any prejudice as a result of the alleged error. Appellants questioned William McLinn extensively about his son's behavior, and similar evidence to that excluded was admitted.

X

Appellants contend that the district court erred in refusing to award punitive damages against Russell

McLinn. Punitive damages are available under the general maritime law and may be imposed for "conduct which manifests 'reckless or callous disregard' for the rights of others or for conduct which shows 'gross negligence or actual malice or criminal indiffernce.' " *Protectus Alpha Navigation Co. v. North Pacific Grain Growers, Inc.*, 767 F.2d 1379, 1385 (9th Cir.1985) (citations omitted).

The district court found that, although Russell McLinn did not exercise reasonable care, there was no creditable evidence that he acted wilfully, recklessly, maliciously, or with gross negligence, This finding is reviewable for clear error. *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1347 (9th Cir.1987). Upon a careful review of the record, we hold that the district court did not clearly err. The district court could properly find that, notwithstanding Russell's intoxication, he did not act with a "reckless or callous disregard for the rights of others" or with "gross negligence or actual malice or criminal indifference." *Protectus Alpha Navigation Co.*, 767 F.2d at 1385.

XI

The district court erred with respect to its comparative fault allocations. The court below incorrectly compared each plaintiff's comparative negligence with the other. The district court held that the percentage of comparative negligence "of each of the two plaintiffs and each of the three defendants is apportioned as follows: Patrick Churchill – 20%; Dale Carlough – 20%; Russell McLinn – 35%; David Panamarioff – 25%; William McLinn and the F/V Fjord – 0%." The district court,

however, should have compared each plaintiff's negligence separately with the defendants. We reverse and remand on this issue for proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED. Each party shall bear its own costs on appeal.

# APPENDIX D

**Carlissa CHURCHILL, As the Informal Administrator of the Estate of Patrick Churchill; and Dale Carlough; Plaintiffs-Appellants,**

**v.**

**The F/V FJORD, her engines, tackle, apparel, appliances, equipment, apparatus and furniture, et al.; William McLinn, owner and operator of said F/V FJORD; Russell McLinn and David Panamarioff; Defendants-Appellees.**

**In the Matter of the Complaint of William McLINN, as owner of the F/V FJORD, her engines, tackle, boilers and equipment, for exoneration from, or limitation of liability.**

**In the Matter of the Complaint of Gilbert Jack JOHNSON and Jack Stewart Johnson, as owners of the F/V SUPERSONIC, her engines, tackle, boilers and equipment, and as owners of one certain Beck 15 foot fiberglass skiff, her engine, tackle and equipment, for limitation of liability.**

No. 86-4178.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Nov. 5, 1987.

Decided Sept. 14, 1988.

As Amended on Denial of Rehearing and
Rehearing En Banc Dec. 18, 1989.

Action was brought seeking damages for wrongful death and personal injury arising from collision of two skiffs. Following remand, 744 F.2d 677, the United States District Court for the District of Alaska, John A. Von der heydt, J., entered judgment in favor of fishing vessel from

which one of the skiffs was operated, and its owner. Plaintiffs appealed. The Court of Appeals, Cynthia Holcomb Hall, Circuit Judge, held that: (1) evidence supported finding that crew member operating fishing vessel's skiff was not in lawful possession so that vessel was not liable in rem for crew member's negligence; (2) fishing vessel owner neither expressly nor impliedly consented to use of skiff for recreational pursuits and thus was not liable under Alaska Owner Responsibility Statute; (3) there was no clear error in finding that skiff's lack of proper operating lights was not a cause of the accident; (4) there was no clear error in finding that vessel owner was not liable under theories of negligent entrustment or family purpose; but (5) District Court incorrectly compared each plaintiff's comparative negligence with the other, rather than separately with the defendants.

Affirmed in part, reversed in part, and remanded.

Opinion 857 F.2d 571, superceded.

Gerald W. Markham, Kodiak, Alaska, for plaintiffs-appellants.

Robert L. Eastaugh, Delaney, Wiles, Hayes, Reitman & Brubaker, Anchorage, Alaska, for defendants-appellees.

Appeal from the United States District Court for the District of Alaska.

Before HUG,* NORRIS and HALL, Circuit Judges.

Cynthia Holcomb HALL, Circuit Judge

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*Judge Hug was drawn to replace Judge Anderson, who died while this appeal was pending. Judge Hug has read the briefs, reviewed the record and listened to the tape of oral argument.

Plaintiffs-appellants Churchill and Carlough sue for wrongful death and personal injury arising from the navigation of three skiffs, two of which collided. The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1333(1) and exercised pendent jurisdiction over plaintiffs' state law claim. The court, after a bench trial, entered judgment in the liability phase of the trial in favor of defendants-appellees William McLinn and the F/V Fjord. Appellants appeal to this court, asserting numerous grounds for reversal. We affirm in part, reverse in part, and remand.

I

A collision of two skiffs occurred outside the entrance to the channel between Near Island and Kodiak Island, Alaska at approximately 1:20 a.m. on June 30, 1979. The channel generally runs in a north-south direction. One craft, operated and occupied only by David Panamarioff (the Panamarioff skiff) was headed in a northerly direction. The other craft, operated by Russell McLinn (the McLinn skiff), was headed in a southerly direction. Russell McLinn was a crew member of the F/V Fjord owner and master, William McLinn. Several days prior to the collision, William McLinn and the rest of the Fjord's crew flew to Seward on the mainland. Russell stayed behind, and on the night of June 30th he used the skiff to attend a beach party on another island. Five others were riding in the McLinn skiff on its return from the party when the collision occurred. The McLinn skiff struck the Panamarioff skiff, resulting in the death of Patrick Churchill and injury to plaintiff Dale Carlough, both of whom were riding in the McLinn skiff. Russell

McLinn was found to be intoxicated with alcohol and probably marijuana at the time of the accident.

At the time of the collision, Michael Chichenoff was navigating a similar seine skiff (the Chichenoff skiff) in approximately the same direction and at approximately the same speed as the Panamarioff skiff. Three passengers occupied the Chichenoff skiff: Lori Chichenoff, Walter Haakanson and Dan Woods. The Chichenoff skiff was to the right of the Panamarioff skiff at a distance variously estimated to be from eight yards to as much as 100 yards.

Panamarioff had been experiencing engine difficulties and was headed home to the nearby village of Ouzinkie on Spruce Island when the accident occurred. Chichenoff had agreed to accompany his friend Panamarioff through the channel to insure that Panamarioff would not be stranded should his engine malfunction. There was no contact between the Chichenoff skiff and either of the other skiffs. None of the skiffs had night running lights and all were allegedly traveling at high speeds in violation of local ordinances.

Chichenoff operated a seine skiff of the salmon fishing vessel F/V Supersonic. The McLinn skiff was used for a similar purpose in conjunction with the F/V Fjord, a purse seiner. The fishing vessels were moored in Kodiak during the temporary closure of the salmon fishery. Plaintiff's suit against the F/V Supersonic and her owners was settled prior to trial.[1]

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[1] Plaintiff's suit against defendant-appellee David Panamarioff was settled while this appeal was pending.

The district court entered an order granting summary judgment to Churchill and Carlough against Panamarioff and Russell McLinn jointly and severally, with the application of a specific comparative negligence formula and with the damages to be determined in a subsequent trial. The court ordered dismissal of the plaintiffs' claim for punitive damages and dismissal of the claims against William McLinn and the F/V Fjord. The court directed the entry of final judgment under Fed.R.Civ.P. 54(b).

II

A district court's findings of fact are reviewed under the clearly erroneous standard. Fed.R.Civ.P. 52(a); *LaDuke v. Nelson*, 762 F.2d 1318, 1321 (9th Cir.1985). Under the clearly erroneous standard of review an appellate court must accept the lower court's findings of fact unless upon review the appellate court is left with the definite and firm conviction that a mistake has been committed. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948); *Dollar Rent A Car of Washington, Inc. v. Travelers Indemnity Co.*, 774 F.2d 1371, 1374 (9th Cir.1985). Questions of law are reviewed *de novo*. *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984).

III

Appellants assert that the F/V Fjord is liable *in rem* for the torts of Russell McLinn in his operation of the Fjord's skiff. To establish the F/V Fjord's *in rem* liability, appellants must show that the skiff is part of the F/V

Fjord's "equipage" and that Russell McLinn was "in lawful possession" of the skiff. *See The Barnstable*, 181 U.S. 464, 467, 21 S.Ct. 684, 685, 45 L.Ed. 954 (1901) ("the law in this country is entirely well settled that the ship itself is to be treated in some sense as a principal, and as personally liable for the negligence of anyone who is lawfully in possession of her, whether as owner or charterer"); *Complaint of McLinn*, 744 F.2d 677, 680 (9th Cir.1984); G. Gilmore & C. Black, *The Law of Admiralty*, § 9-18 at 615 (2d ed. 1975) ("Gilmore & Black").

The district court dismissed appellants' *in rem* claim against the Fjord, finding that no credible evidence adequately supported plaintiffs' allegations. In order to conclude that the Fjord was not liable *in rem*, the district court must have found either that the skiff is not part of the Fjord's equipage or that Russell McLinn was not in lawful possession, or both. Thus, we may affirm the district court's conclusion of no *in rem* liability if either possible implicit finding is not clearly erroneous.

Because appellants must show both that the skiff is part of the equipage of the F/V Fjord and that Russell McLinn was in lawful possession of the skiff to establish *in rem* liability, we need not reach the equipage question in order to affirm the district court's ruling that there is no *in rem* liability.[2] We affirm the district court solely on

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[2] The district court did not specifically decide whether the McLinn skiff was part of the equipage of the F/V Fjord, although it did hold that the Chichenoff skiff was part of the equipage of the F/V Supersonic. Although there is no indication in the record that the district court did not consider the McLinn skiff to be part of the equipage of the Fjord, the parties are in dispute on this issue and we need not resolve it.

the basis that the evidence in the record supports an implicit finding that Russell McLinn was not in lawful possession of the Fjord's skiff. *See Beezley v. Fremont Indemnity Co.*, 804 F.2d 530, 530 n. 1 (9th Cir.1986), *cert. denied*, 480 U.S. 949, 107 S.Ct. 1610, 94 L.Ed.2d 796 (1987) ("we may affirm the district court on any basis fairly supported by the record").

Under the doctrine of *in rem* liability, charterers, pilots and stevedors are considered to be in lawful possession, whereas pirates, mutineers and "like" people are not. Gilmore & Black, § 9-10 at 601. As discussed by Gilmore & Black, the *Barnstable* rule of lawful possession should be viewed as creating liability where the owner of the vessel has entrusted control to a third party. Gilmore & Black, § 9-18 at 621; *see Complaint of McLinn*, 744 F.2d at 685 (implying that vessel owner's consent to the use of the vessel's skiff in activities not involving the employee's duties is relevant to a finding of lawful possession); *Cavcar Co. v. M/Z Suzdal*, 723 F.2d 1096, 1101 (3d Cir.1983). Thus, the rule requires that the vessel's owner give some degree of consent or authorization to the third party.

Despite Russell McLinn's status as a member of the Fjord's crew, the record supports the district court's implicit finding that he was not in lawful possession of the skiff. His use of the skiff was much more like that of a mutineer, pirate, or thief than a charterer, pilot, or stevedore. It is clear from the record that Russell did not have any authority from his father, William, to use the skiff. Use of the skiff was highly regulated and Russell required his father's permission to use the skiff. No one other than William McLinn possessed the authority to allow Russell to use the skiff.

When leaving the Fjord for his flight to Seward, both William McLinn and Joe Borg, the skiffman on the Fjord, told Russell to stay out of the skiff and not to touch the skiff. William admonished his son that he saw no reason for Russell to use the skiff while he was gone. In addition, Russell's personal, recreational use of the skiff at night while under the influence of alcohol and probably marijuana, contrary to all expectations for the skiff's use, supports the district court's implicit conclusion that Russell was not in lawful possession of the skiff.

Although the district court did not make an express finding on the issue of lawful possession in rejecting appellants' *in rem* claim, the evidence in the record supports an implicit finding that Russell was not in lawful possession of the McLinn.[3] Therefore, the Fjord is not

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[3] After the district court entered its findings of fact and conclusions of law, appellants twice moved the court to amend its findings and judgment on the issue of lawful possession. The district court again was presented with both the appellants' and the appellees' evidence on the issue. Appellees' evidence at trial consisted primarily of the testimony of William McLinn and Joe Borg, but also included testimony by Russell McLinn.

By refusing to amend its findings, it is clear that the district court again rejected appellants' claim that Russell was in lawful possession of the skiff. Consequently, we conclude that the district court necessarily accorded greater weight to appellees' evidence. We will not second-guess that assessment of credibility. *United States v. Gomez*, 846 F.2d 557, 560-61 (9th Cir. 1988) ("We cannot second-guess trial court findings that depend on explicit or implicit credibility assessments unless the findings are unsupported by the record.").

liable *in rem* for Russell McLinn's negligence in operating the skiff.

IV

The dismissal of appellants' claim against William McLinn under the Alaska Owner Responsibility Statute, AS § 05.25.040, is reviewed de novo. *In re McLinn*, 739 F.2d 1395, 1397 (9th Cir.1984) (en banc). The district court dismissed this pendent state law claim on the basis of federal preemption. We affirm the district court, but do so on a different ground which is fairly supported by the record. *See Beezley*, 804 F.2d at 530 n. 1.

A

Section 05.25.040 provides that:

> the owner of a watercraft is liable for injury or damage caused by the negligent operation of his watercraft. . . .The owner is not liable, however, unless his watercraft is used with his express or implied consent. It is presumed that his watercraft is being operated with the knowledge and consent of the owner, if at the time of the injury or damage, it is under the control of his . . . son.

"Watercraft" is defined by AS § 05.25.100(4) to mean "every description of vessel . . . used or capable of being used as a means of transportation on water and devoted to recreational pursuits."

In light of this court's holding in *Complaint of McLinn*, it is apparent that the McLinn skiff falls within the coverage of section 05.25.040. *See* 744 F.2d at 683 (non-documented vessels temporarily devoted to recreational

pursuits are "watercraft" within meaning of Alaska Owner Responsibility Statute). William McLinn cannot be held liable for the injury caused by his son's negligent operation of the skiff, however, unless his watercraft was used with his express or implied consent. AS § 05.25.040.

Although consent may be presumed if the watercraft was under the control of the owner's son at the time of the injury, *id.*, there is ample record evidence to support a conclusion that the presumption was rebutted in this case. As noted above, William McLinn expressly directed his son to stay off the skiff while he was in Seward, and told Russell that he saw no reason to use the skiff in his absence. William McLinn could hardly have done more to dispel an inference that he either expressly or impliedly gave Russell his permission to use the skiff to travel to and from a drinking party on a nearby beach. When asked in deposition whether he was authorized to use the skiff, moreover, Russell McLinn replied: "Not that – no. I don't think so." Because we conclude that William McLinn neither expressly nor impliedly consented to Russell's use of the skiff for his "recreational pursuits," appellants' claim under the Alaska Owner Responsibility Statute must fail.

B

Because we have rejected appellants' pendent state law claim under the Alaska Owner Responsibility Statute on its merits, we must also decide whether the district court erred by striking appellants' jury trial demand from the complaint. Entitlement to a jury trial in federal court is a question of law freely reviewable. *Standard Oil Co. of*

*California v. Arizona*, 738 F.2d 1021, 1022-23 (9th Cir.1984), *cert. denied*, 469 U.S. 1132, 105 S.Ct. 815, 83 L.Ed.2d 807 (1985).

Appellants assert that the pendent state law claim under AS § 05.25.040 entitles them to a trial by jury. The district court rejected this argument, citing the Fifth Circuit's opinion in *Tallentire v. Offshore Logistics, Inc.*, 754 F.2d 1274, 1287 (5th Cir. 1985), *rev'd on other grounds*, 477 U.S. 207, 106 S.Ct. 2485, 91 L.Ed.2d 174 (1986), *on remand*, 800 F.2d 1390 (1988). In *Tallentire*, the court held that where a state law claim is in federal court solely by virtue of admiralty jurisdiction, plaintiffs are not entitled to a jury trial. *Id.* Although at first blush such a rule seems harsh, to hold otherwise would contravene the manifest purpose of Federal Rule of Civil Procedure 38(e) by allowing jury trials in admiralty cases in which plaintiffs allege a pendent state law claim. *See also Ashland Oil v. Third Nat. Bank of Ashland, Ky.*, 557 F.Supp. 862, 872 (E.D.Ky.1983) (no right to jury trial on common law cross-claim in action in which admiralty is sole basis of jurisdiction).

Appellants argue, however, that the general rule of no jury trials in admiralty cases should be disregarded when a plaintiff is forced into federal court by defendant's limitation action under 46 U.S.C. § 181-89. Appellants further assert that our decision in *Complaint of Paradise Holdings Inc.*, 795 F.2d 756, 763 (9th Cir.), *cert. denied*, 479 U.S. 1008, 107 S.Ct. 649, 93 L.Ed.2d 705 (1986) (district court has discretion to stay related state court proceedings while hearing action brought under Limitation Act), precludes plaintiffs from proceeding in state court in the face of a limitation action in federal court.

Appellants' arguments might have force if, having chosen a forum or pled claims on which a jury trial was available, they were forced into a court of admiralty by appellees. This was not such a case. The appellants here selected the federal forum in the first instance, and repeatedly designated their complaint as arising in admiralty. In these circumstances, we agree with the district court, and with the Fifth Circuit, that appellants were not entitled to a jury trial on their pendent claim under the Alaska Owner Responsibility Statute.

V

It was undisputed in the court below that the McLinn skiff did not have proper operating lights, in violation of, *inter alia*, 46 C.F.R. § 25.05-1 (1982). This violation establishes statutory fault on the part of the skiff, and serves as a basis for *in rem* liability of the F/V Fjord. *See Complaint of McLinn*, 744 F.2d at 680. Once statutory fault is established, the rule of *The Pennsylvania*, 86 U.S. (19 Wall.) 125, 22 L.Ed. 148 (1873), places the burden of exoneration on appellees to show "not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been." *Id.* 86 U.S. at 136.

The district court held as a matter of law that the lack of lights was not a cause of the accident. This court reviews a finding of proximate cause, or lack thereof, for clear error. *Armstrong v. United States*, 756 F.2d 1407, 1409 (9th Cir.1985); *see Trinidad Corp. v. S.S. Keiyoh Maru*, 845 F.2d 818, 827 (9th Cir.1988) ("We review the district court's application of facts to *The Pennsylvania* rule under the clearly erroneous standard."). Testimony at trial was

that the natural lighting was "dusk-like," although the qualities inherent in this term were disputed by the parties. Although the McLinn skiff was leaving an area of greater darkness relative to the illumination surrounding the Panamarioff skiff, Chichenoff testified the McLinn skiff was "pretty clear" to him approximately thirty seconds prior to the collision. Haakanson, a passenger in the Chichenoff skiff, discussed with Chichenoff the approaching McLinn skiff thirty to forty seconds prior to the collision.

Although the district judge termed Russell McLinn's testimony incredible in many major areas, Russell testified he saw the Chichenoff skiff approximately a minute before impact. Panamarioff, who was intoxicated, was distracted by his balky outboard motor. Witnesses testified Panamarioff was looking back at his engine just before the collision. Russell McLinn also testified to this. Panamarioff himself admitted that he looked up immediately prior to the collision to see the oncoming McLinn skiff. Although the facts are disputed with respect to whether Panamarioff was viewing forward so that lights could have warned him of the closing McLinn skiff, the district court did not clearly error in refusing to so find.

In construing the rule of *The Pennsylvania*, this court has held that the vessel statutorily at fault has the burden of establishing the violation "could not reasonably be held to have been a proximate cause of the collision." *Pacific Tow Boat Co. v. States Marine Corp.*, 276 F.2d 745, 749 (9th Cir.1960). More recently, we held that "the burden imposed under *The Pennsylvania* rule is discharged by a clear and convincing showing of no proximate cause, rather than the stricter test of beyond a reasonable

doubt." *Trinidad Corp.*, 845 F.2d at 825.[4] Applying this standard, the evidence supports the district court's finding that the absence of lights was not a proximate cause of the accident.[5]

## VI

Although the district court did not expressly address the question whether Russell McLinn was required to blast a sound signal, the fact findings of the court below dispose of the issue.

Appellants assert that the collision actually took place within the channel between Near Island and Kodiak Island and that the vision between the approaching vessels was obscured by an intervening obstruction, a large

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[4] We note that our decision in *Trinidad Corp.* reexamined *States S.S. Co. v. Permanente S.S. Corp.*, 231 F.2d 82 (9th Cir.1956). In *Permanente S.S. Corp.*, we held that the rule of *The Pennsylvania* requires the vessel statutorily at fault to "prove *beyond reasonable doubt* that the collision would [nonetheless] have occurred." *Id.* at 87 (emphasis added) (quoting *Oriental Trading & Transp. Co. v. Gulf Oil Corp.*, 173 F.2d 108, 109 (2d Cir.), *cert. denied*, 337 U.S. 919, 69 S.Ct. 1162, 93 L.Ed. 1729 (1949)). We are bound by our decision in *Trinidad Corp.*, which reexamined our earlier decisions in light of subsequent Supreme Court precedent. 845 F.2d at 825 n. 5. *See, e.g., Heath v. Cleary*, 708 F.2d 1376, 1378 n. 2 (9th Cir.1983) ("Where . . . a Supreme Court decision has effectively undermined prior Ninth Circuit precedent, a [three-judge panel is] free to reexamine those earlier cases to determine their continuing validity.")

[5] We note that this court in a prior appeal also agreed with the district court on this issue with respect to Chichenoff's negligence. *Complaint of McLinn*, 744 F.2d at 684 n. 3.

bluff at the entrance to the Near Island channel. Because of the obstruction, appellants argue, a sound signal was required by law. 72 COLREGS (International Regulations for Preventing Collisions at Sea) 9(a)(f), or 34(e).

There is ample evidence in the record to support not only the district court's finding that the collision took place outside the channel entrance, but also that the advancing skiffs were visually aware of each other. Therefore, no intervening obstruction obscured the skiffs from their operators' field of vision and no sound signal was required.

VII

The district court held that William McLinn was not liable to plaintiffs under the doctrine of negligent entrustment. The doctrine of negligent entrustment is embodied in Restatement (Second) of Torts § 390 (1965), and both parties agree that § 390 should apply to suits in admiralty. *See Pan-Alaska Fisheries, Inc. v. Marine Construction & Design*, 565 F.2d 1129, 1133-34 (9th Cir.1977). Section 390 provides that one who supplies a chattel for another's use whom the supplier "knows or has reason to know" is likely to use the chattel in a manner "involving unreasonable risk of physical harm to himself and others" is subject to liability for the physical harm resulting to them. Restatement (Second) of Torts § 390. To prevail on this theory, appellants must show that William McLinn supplied the skiff directly to his son, and must have known or should have known that Russell would be likely to use the skiff in a dangerous manner. This court reviews for clear error whether a duty of care has been

breached. *Eichelberger v. NLRB*, 765 F.2d 851, 856 (9th Cir.1985); *Armstrong*, 756 F.2d at 1409.

First, there is ample evidence to support the conclusion that William McLinn did not "supply" the skiff to his son for his use. As noted above, Russell McLinn did not have permission to use the skiff, and, according to his father, Russell did not use the skiff in the past without his father's permission. Second, there is enough evidence in the record for the district court to find that William McLinn did not know or have reason to know that his son would operate the skiff in a harmful manner. Russell McLinn had not previously disobeyed his father on any serious matter or given his father any reason to believe he would disobey instructions not to use the skiff. Further, William McLinn had observed his son using the skiff and believed he was a competent operator. Prior to the collision, William McLinn had never seen his son drunk or under the influence of alcohol or marijuana, although the evidence at trial on this point was conflicting. In addition, William McLinn testified he was unaware of Russell's legal problems with marijuana, driving while intoxicated charges, or juvenile problems in Hawaii. The district court did not clearly err.

VIII

The district court found no creditable evidence adequately supported appellants' allegations that William McLinn was liable under the doctrine of family purpose. The evidence supports the district court's conclusion that liability could not be predicated on the family purpose doctrine. Although as appellants assert, the bases of the

court's finding may be ambiguous, there is evidence indicating that the F/V Fjord was not simply a family activity, but was part of a commercial enterprise. Further, as the facts described above show, Russell McLinn's use of the skiff on June 30, 1979 is not consistent with any conceivable family purpose.

IX

Appellants assert that the district court erred in sustaining objections to appellants' attempts to introduce evidence concerning Russell McLinn's reputation for delinquency. Appellants argue such evidence is relevant to the issue whether William McLinn knew or should have known his son would use skiff in a dangerous manner. Therefore, appellants contend that the district court's rejection of the negligent entrustment claim must be reversed as a result of the error. This court reviews evidentiary rulings for an abuse of discretion. *Coursen v. A.H. Robins Co., Inc.*, 764 F.2d 1329, 1333 (9th Cir.1985).

We hold that the district court did not abuse its discretion in excluding the evidence. It was clearly in the district court's discretion to decide whether the evidence appellants sought to admit was relevant under Federal Rule of Evidence 401, or outweighed by its potential prejudice and its potential for wasting the court's time. Fed.R.Evid. 403. *See id.* at 1333-35, 1339-40. Further, appellants did not suffer any prejudice as a result of the alleged error. Appellants questioned William McLinn extensively about his son's behavior, and similar evidence to that excluded was admitted.

X

Appellants contend that the district court erred in refusing to award punitive damages against Russell McLinn. Punitive damages are available under the general maritime law and may be imposed for "conduct which manifests 'reckless or callous disregard' for the rights of others or for conduct which shows 'gross negligence or actual malice or criminal indifference.' " *Protectus Alpha Navigation Co. v. North Pacific Grain Growers, Inc.*, 767 F.2d 1379, 1385 (9th Cir.1985) (citations omitted).

The district court found that, although Russell McLinn did not exercise reasonable care, there was no creditable evidence that he acted wilfully, recklessly, maliciously, or with gross negligence. This finding is reviewable for clear error. *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1347 (9th Cir. 1987). Upon a careful review of the record, we hold that the district court could properly find that, notwithstanding Russell's intoxication, he did not act with a "reckless or callous disregard for the rights of others" or with "gross negligence or actual malice or criminal indifference." *Protectus Alpha Navigation Co.*, 767 F.2d at 1385.

XI

The district court erred with respect to its comparative fault allocations. The court below incorrectly compared each plaintiff's comparative negligence with the other. The district court held that the percentage of comparative negligence "of each of the two plaintiffs and each of the three defendants is apportioned as follows: Patrick Churchill – 20%; Dale Carlough – 20%; Russell

McLinn – 35%; David Panamarioff – 25%; William McLinn and the F/V Fjord – 0%." The district court, however, should have compared each plaintiff's negligence separately with the defendants. We reverse and remand on this issue for proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED. Each party shall bear its own costs on appeal.

## APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
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| CARLISSA CHURCHILL, As the Informal Administrator of the Estate of Patrick Churchill; and DALE CARLOUGH; Plaintiffs-Appellants, v. THE F/V FJORD, her engines, tackel, apparel, appliances, equipment, apparatus and furniture, et al.; WILLIAM McLINN, owner and operator of said F/V FJORD; RUSSELL McLINN and DAVID PANAMARIOFF; Defendants-Appellees. | No. 86-4178<br>D.C. No. CV-80-038-vdh<br>ORDER<br>(Filed Feb 2, 1990) |
| In the Matter of the Complaint of William McLinn, as owner of the F/V FJORD, her engines, tackle, boilers and equipment, for exoneration from, or limitation of liability. | |
| In the Matter of the Complaint of Gilbert Jack Johnson and Jack Stewart Johnson, as owners of the F/V SUERSONIC [sic], her engines, Tackle, boilers and equipment, and as owners of one certain | |

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|---|---|
| Beck 15 foot fiberglass skiff, her engine, tackle and equipment, for limitation of liability. | ) ) ) ) ) |

Before: HUG, NORRIS, HALL, Circuit Judges.

Appellants' petition for rehearing of the Order and Amended Opinion filed December 18, 1989, is DENIED.

## APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

| | |
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| CARLISSA CHURCHILL, as the Informal Administrator of the Estate of PATRICK CHURCHILL, and DALE CARLOUGH,<br><br>Plaintiffs,<br><br>vs.<br><br>The F/V FJORD, et al.,<br><br>Defendants. | A80-038 CIV |
| In the Matter of the Complaint of WILLIAM McLINN, as owner of the F/V FJORD, her engines, tackle, boilers and equipment for exoneration from, or limitation of liability. | A80-250 CIV |
| In the Matter of the Complaint of GILBERT JACK JOHNSON and JACK STEWART JOHNSON, as owners of the F/V SUPERSONIC, her engines, tackle, boilers and equipment, and as owners of one certain Beck 15 foot fiberglass skiff, her engine, tackle and equipment, for limitation of liability. | A80-321 CIV<br><br>*MEMORANDUM AND ORDER*<br><br>(Filed Sept. 23, 1985) |

Consolidated Under A80-038 CIV

THIS CAUSE comes before the court on a number of motions of the parties. The parties' requests for oral

argument are denied to expedite the business of the court. The facts of this case are set forth in the Ninth Circuit's prior decision in this action, *In re McLinn*, 744 F.2d 677 (9th Cir. 1984).

I. Plaintiffs' Motion to Compel Certain Defendants to Post Bond; Defendants Johnson's Motion for Partial Summary Judgment Regarding Definition of Vessel

Initially, the motion to compel is denied as moot in respect to defendants McLinn and the F/V FJORD, such defendants having since filed a bond for $36,000.

Defendants Johnson allege they have posted an *"ad interim* stipulation" for $1,500 with the court. The Court has been unable to locate this bond and assumes for the purpose of this motion it has not been posted.

The primary issue before the court is whether the Johnsons may limit their liability to the value of the skiff, $1,500, or must include the value of the F/V SUPERSONIC in their bond. The outcome of this dispute depends on the definition of the word "vessel" as that term is used in 46 U.S.C. §§ 183-185 and Supplemental Admiralty Rule F(1). If the F/V SUPERSONIC and her skiff are two separate vessels, then defendants need only post the value of the skiff. If, however, the skiff is considered to be part of the SUPERSONIC, then bond must be tendered in the higher amount.

In support of their motion, defendants cite the "flotilla" rule and numerous cases involving tugs and barges. The court finds that the "tug and barge" cases are factually distinguishable from the present case and therefore present little guidance. The distinguishing features of the

barge cases are two-fold. First, barges are not part of the equipment necessary for the tug to perform its duties. A purse-seiner, on the other hand, cannot operate without a skiff. The two are part of one operating unit. Second, tugs and barges are not necessarily owned by the same party, whereas a seiner and skiff are, and generally the two will be sold together for one price. Thus, while the barge and tug are separate economic units, the seiner and skiff are part of one economic unit.

The issue of whether a skiff should be considered part of a seiner is an open one. Defendants rely on *Goggin v. United States*, 79 F. Supp. 812, 815 (S.D. Cal. 1948). However, the statement in that case that a landing craft is not part of the naval attack transport to which it is assigned is merely dictum, the case having been decided against plaintiff on the issue of liability. Nor does the *Goggin* court support its conclusion with any reasoning. This court finds the reasoning in *In re Ocean Fisheries, Inc.*, 1931 A.M.C. 381 (E.D. Va. 1930), to be more sound, particularly that court's conclusion that the skiff was part of the equipment of the seiner, the two being "one single, solitary enterprise." *Id.* at 383.[1] *Ocean Fisheries* is distinguishable, in theory, in that it involved the "contractual" relation of servant-master, which allows for a broader definition of "vessel." *See Sacramento Navigation Co. v. Salz*, 273 U.S. 326 (1927); *Standard Dredging Co. v. Kristiansen*, 67 F.2d 548, 550-51 (2d Cir. 1933). Nevertheless, it is doubtful to this court that the *Ocean Fisheries* court

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[1] The court in *In re No. 5 Motor Lifeboat*, 57 F. Supp. 624, 1944 A.M.C. 1110 (S.D.N.Y. 1944), found the issue an open one, but did not decide the issue.

considered the flotilla rule in arriving at its decision. Therefore the court finds its reasoning applicable here.

The Supreme Court noted in *The Main v. Williams*, 152 U.S. 122, 131 (1894), "[t]he real object of the [limitation of liability act is] to limit the liability of vessel owners to their interest in the adventure." Thus it is appropriate, for determining whether the skiff was a separate vessel, to examine whether the skiff represented a separate adventure. This court previously found that the seine skiff was part of the equipage of the SUPERSONIC. As was the case in *Ocean Fisheries*, they were part of a single economic enterprise at the time of the accident. Therefore, the skiff must be considered part of the seiner for the purpose of limitation of liability.[2] Accordingly, in order to maintain their limitation action, the Johnsons must post a bond that includes the value of the SUPERSONIC.

Under Rule F it is initially petitioner's obligation to determine the value of its vessel when posting bond, and such determination of course must be done in good faith. Here, the minimum value that would be acceptable is $110,000, the value given to the SUPERSONIC in the initial petition for limitation of liability. Should be Johnsons continue to seek to limit liability, a bond in the proper amount must be filed with the court within 30 days of the date of this order.

II. Plaintiffs' Motion to Strike

Plaintiff has moved to strike McLinn's stipulation for value and costs on the ground that the 6 per cent interest

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[2] In this respect the skiff is distinguishable from a barge, which generally is part of a separate economic enterprise.

on the value of the stipulation should run from the date of the filing of the complaint, not the filing of the security. This problem arises for the reason that, although the complaint for limitation of liability was originally filed August 8, 1980, no *ad interim* stipulation for value and costs was filed until 1985.[3]

Supplemental Admiralty Rule F(1) requires a vessel owner, if he elects to post security, to give additional security "for interest at a rate of 6 per cent per annum *from the date of the security.*" (emphasis added) However, Rule F also requires that the security be filed contemporaneously with the complaint and "not later than six months after . . . receipt of a claim." Therefore, where no security was filed with the complaint, interest on the security must be calculated from the date of the complaint. Otherwise, plaintiff loses his right, as embodied in the rule, to interest from the date of complaint.

III. Defendants' Motion re Sound Devices

The court notes that its prior decision regarding light requirement regulations, and the Ninth Circuit's affirmance thereof, covered violation of both the CFR and 72 COLREG requirements. Accordingly, plaintiffs cannot reraise the light regulation issue at this time.

Plaintiff initially argues that the Chichenoff skiff had an obligation to sound the following signals: (1) a Narrow Channel-Bend Signal; (2) a one blast signal on turning

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[3] The court is uncertain why the limitation action was not perfected in 1980. Any objection to the lateness has apparently been waived by plaintiff, however.

starboard to avoid the McLinn skiff; and (3) a passing signal when passing the Panamaroff skiff. The court will assume that each of these failures was in violation of regulations regarding sound signals. Nevertheless, these theories must be dismissed for the same reason that the claims regarding light signals were dismissed: Even assuming a statutory violation, the violations could not have been the proximate cause of the accident.

Under the *Pennsylvania* rule, once a statutory violation is established, the burden rests on the ship to show that the violation "could not have been" a contributing cause of the accident. *United States v. Joyce*, 511 F.2d 1127, 1129 (9th Cir. 1975). The test, however, is one of reasonableness. If the alleged causal relation is too improbable, speculative, or remote, judgment may be granted at the summary judgment stage. *In re McLinn*, 744 F.2d 677, 684 n.3 (9th Cir. 1984); *First National Bank of Chicago v. Material Service Corp.*, 547 F.2d 1110, 1117 (7th Cir. 1979), *Joyce, supra*, 511 F.2d at 1129.

The signals listed above, if given, could not have prevented any accident for the reason none could reasonably have been expected to direct the attention of the McLinn skiff to the Panamaroff skiff. A far more probable result is that such signals merely would have confused the McLinn skiff by calling attention to the Chichenoff skiff, of which the McLinn skiff was already aware.

Plaintiff also alleges that the Chichenoff skiff failed to give the danger signal required by Rule 34(d) and a signal to attract attention as permitted under Rule 36. The court finds that these failures could not be a proximate cause of

the accident for the reason that defendant had not duty to sound these signals.

Rule 34(d) of the 72 COLREGS states:

> When vessels in sight of one another are approaching each other the from any cause either vessel fails to understand the intentions or actions of the other, or is in doubt whether sufficient action is being taken by the other *to avoid collision,* the vessel in doubt shall immediately indicate such doubt by giving at least five short and rapid blasts on the whistle. . . . (emphasis added)

The court interprets this rule to require a signal only if a vessel is in doubt whether the other vessel is taking sufficient [action, sic?] to avoid collision *with it.* The rule does not require action when the possibility of collision is with a third ship. This interpretation is required because, in most situations where a ship witnesses an accident about to happen between two other ships, blasting a warning signal will not serve to call the approaching ship's attention to the other ship. Rather, it will cause confusion. Further, the court finds, from reviewing the language of the rule, that the three-ship situation simply was not in the contemplation of the drafters of the rule.

Likewise, Rule 36 did not create a duty to sound a signal. That rule is permissive, not mandatory, and did not require a signal under the circumstances of this case. *Capt'n Mark v. Sea Fever Corp.*, 642 F.2d 162, 168 n.2 (1st Cir. 1982); *Union Shipping & Trading Co. v. United States*, 127 F.2d 771, 773 (2d Cir. 1942).

Finally, plaintiff alleges that the Chichenoff skiff had a common-law, non-statutory duty to sound a signal. The

court finds that there was no duty to sound a horn or signal. The case plaintiff relies on, *United States v. The Australian Star*, 172 F.2d 472 (2d Cir. 1949), is distinguishable. In the *Australian Star*, the PC-616 had undertaken a duty to protect and escort the Hindoo, and additionally was giving its orders regarding speed and direction. Therefore, the Hindoo (and the Australian Star) were entitled to rely on the fact that the PC-616 would carry out its tasks responsibly. The Chichenoff undertook no similar duty to protect the Panamaroff skiff in this case.

IV. Motion to Dismiss Claims Based on A.S. § 05.25.040

Defendants Johnson have also moved to dismiss plaintiffs in personam [sic] claims on the basis that they are preempted by federal maritime law. The standard for when an admiralty court may apply state law is set forth in *St. Hilaire Moye v. Henderson*, 496 F.2d 973, 980 (8th Cir. 1974). As stated there,

> [A]dmiralty suits are governed by federal substantive and procedural law. However, a federal court sitting in admiralty need not "invariably refuse to recognize and enforce a liability which the State has established in dealing with a maritime subject. On the contrary, there are numerous instances in which general maritime law has been modified or supplemented by state action . . . ." . . . [In certain circumstances], [t]he Supreme Court has sustained the application of state laws which broaden the scope of liability beyond the general maritime standard.
>
> . . . [S]tate law, [however,] may not be applied to "contravene an act of Congress, to prejudice the characteristic features of maritime

> law or to disrupt the harmony it strives to bring to international and interstate relations. Even if state law does not contravene an established principle of admiralty, it may be deemed preempted if it is in direct contravention of the uniformity of the admiralty law in some crucial respect.

*Id.* (citations omitted).

Plaintiffs initially argue that the preemption issue was decided by implication by the Ninth Circuit in *In re McLinn*, 744 F.2d 677, 682 (9th Cir. 1984). Given the absence of any discussion of the preemption issue in the Circuit's opinion, this court can only conclude that the issue simply was not addressed. The preemption issue is a major, complex issue, and it simply is not credible to assume that the Ninth Circuit would decide the issue and not mention it, if only in a footnote.[4]

Upon examination of the preemption issue, this court finds that two separate decisions are required. First, does application of the Alaska Owner Responsibility Statute, A.S. § 5.25.040, contravene the principles of limitation of liability law? If so, then in personam [sic] liability under the law must be limited to the value of the limitation fund. Second, does the statute's expansion of owner's liability to create no-fault liability for owners of vessels used for pleasure-boating sufficiently contravene (1) the goal of uniformity of admiralty law, and (2) the current

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[4] *See also In re McLinn*, 744 F.2d 677 (9th Cir. 1984) ("[W]e find that Alaska Owner Civil Liability statute *may* be applicable. . . .") (emphasis added).

admiralty law principle of no owner liability for negligence of crew members that the statute is preempted completely?

The answer to the first issue is more clear than the answer to the second, and accordingly the court will address it first. The court finds that the Owner Responsibility Statute, as applied to the facts of this case, would directly conflict with an act of Congress, the Limitation of Liability Act, 46 U.S. § 183, if it were allowed to create unlimited liability.

The issue actually is not a preemption problem at all, but one of statutory interpretation. The Limitation Act holds "[t]he liability of the owner of any vessel, . . . [for] damage or injury by collision, . . , done . . . without the privity or knowledge of such owner . . . shall not . . . exceed the amount or value of the interest of such owner in such vessel. . . ." *Id.* The vessel involved here, a commercial fishing vessel and its skiff, clearly fall within the definition of the statute. *See* 43 U.S.C. § 188; *cf. Baldassano v. Larsen*, 580 F. Supp. 415 (D. Minn. 1984).[5] Similarly, the Limitation Act includes within its scope *all losses* occasioned by the negligence of the owners crew, absent privity or knowledge by the owners. Thus, the losses and liability arising out of the accident fall squarely within the terms of the Limitation of Liability Act and

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[5] The skiff involved in the accident is used primarily for commercial fishing and is part of the equipage of a larger commercial fishing vessel. The court therefore need not decide whether limitation of liability applies to strictly recreational vessels.

the Johnsons can limit their liability to the value of the vessel.

The court also finds that the state statute interferes with the goal of uniformity of admiralty, and is therefore totally preempted.[6]

First, the court finds that to hold the Johnsons liable without fault would be a deviation from general maritime law principles. In *Kermerac v. Compagne Generale Transatlantique*, 358 U.S. 625, 632 (1959), the Supreme Court held that a ship owner was under duty to those who were on board to exercise reasonable care and no more. *See also Cook v. Exxon Shipping Co.*, 762 F.2d 750, 751-52 (9th Cir. 1985); *Craig v. M/V Peacock*, 760 F.2d 953, 955 (9th Cir. 1985); *Branch v. Schumann*, 445 F.2d 175, 177-78 (5th Cir. 1971). This "liability for negligence" standard applies equally regarding the duty owned to those aboard *another* ship.

Second, the goal of uniformity of liability standards is important, even as it applies to pleasure boaters. The Supreme Court in *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982), declined to distinguish between commercial and recreational boating for the purposes of establishing federal admiralty jurisdiction. In so doing, it stated that no distinction should be drawn between different types of vessels for purposes of establishing uniform rules of conduct or liability. It stated:

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[6] Given that in rem liability will probably exist if Chichenoff is found negligent, this holding in all likelihood will not affect ultimate liability.

> The federal interest in protecting maritime commerce cannot be adequately served if admiralty jurisdiction is restricted to those individuals actually *engaged* in maritime activity. This interest can be fully vindicated only if *all* operators of vessels on navigable waters are subject to uniform rules of conduct. . . .
>
> . . . [Under the rule proferred by petitioners, t]he owner of a vessel used for both business and pleasure might be subject to radically different rules of liability depending upon whether his activity at the time of a collision is found . . . to have been sufficiently "commercial." We decline to inject the uncertainty inherent in such line drawing into maritime transportation. Moreover, the smooth flow of maritime commerce is promoted when all vessel operators are subject to the same duties and liabilities. Adopting the strict commercial rule would frustrate the goal of promoting the smooth flow of maritime commerce, because the duties and obligations of noncommercial navigators traversing navigable waters . . . would differ [depending upon location].

*Id.* at 674-76. The statute in question here, A.S. § 5.25.040, creates exactly the situation that the Supreme Court found untenable in *Richardson*: different liability depending on location and type of vessel.

Recent lower federal court decisions have similarly reached the conclusion that federal maritime liability must be uniform. For example, the Fifth Circuit in a case almost directly on point held that a state statute that created a higher duty of care for boat operators was preempted by federal maritime law. *Branch, supra.* The Ninth Circuit in two recent cases also held that the need

for uniform maritime liability standards required preemption of state statutes. *See Nygaard v. Peter Pan Seafoods, Inc.*, 701 F.2d 77 (9th Cir. 1983); *Nelson v. United States*, 639 F.2d 469 (9th Cir. 1981). *See also St. Hilaire Moye v. Henderson*, 496 F.2d 973 (8th Cir. 1974) (holding statute creating lower standard of care preempted).[7]

V. Plaintiffs' Motion to Amend Witness List

Plaintiffs' motion to amend witness list, Docket #212, being unopposed, is deemed well taken and granted. Local Rule 5(B)(4).

Accordingly, IT IS ORDERED:

(1) THAT the parties numerous motions for extension of time are granted; the Clerk shall file the proposed reply lodged with Docket #185 nunc pro tunc as of March 13, 1985;

(2) THAT the motions for partial summary judgment regarding use of sound devices by the Johnsons and by Chichenoff are granted;

(3) THAT plaintiffs' motion to compel posting of bond is denied regarding the F/V FJORD and granted regarding the F/V SUPERSONIC, and that Johnsons' motion for summary judgment regarding definition of vessel is denied. The SUPERSONIC shall filed a bond in the

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[7] Several earlier Supreme Court cases support the opposite conclusion. *See, e.g., Hess v. United States*, 361 U.S. 314 (1960); *Just v. Chambers*, 312 U.S. 383 (1941). The continued validity of these cases is questionable in the light of *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), and *Richardson, supra*.

proper amount within 30 days of the date of this order or else this court shall dismiss its limitation action;

(4) THAT plaintiffs' motion to strike McLinn's stipulation for value and costs is granted as follows: The F/V FJORD shall file a bond in the proper amount within 30 days of the date of this order or else this court shall dismiss its limitation action;

(5) THAT plaintiffs' motion to amend witness list is granted;

(6) THAT defendant Johnsons' and defendant Chichenoffs' motions to dismiss claims regarding navigational lights, Docket ##220 and 223, are granted pursuant to the above opinion; and

(7) THAT defendant Johnsons' motion to dismiss plaintiffs' claims under A.S. § 5.25.040 based on preemption is granted.

DATED at Anchorage, Alaska this 23 day of September, 1985.

/s/ James A. Von der Hydt
United States District Judge

cc: Gerald W. Markham
Gordon J. Tans
Alan Schmitt
Clay A. Young
Arden Page

## APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

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|---|---|
| CARLISSA CHURCHILL, as the Informal Administrator of the Estate of PATRICK CHURCHILL, and DALE CARLOUGH, Plaintiffs, vs. The F/V FJORD, et al., Defendants. | A80-038 CIV |
| In the Matter of the Complaint of WILLIAM McLINN, as owner of the F/V FJORD, her engines, tackle, boilers and equipment for exoneration from, or limitation of liability. | A80-250 CIV |
| In the Matter of the Complaint of GILBERT JACK JOHNSON and JACK STEWART JOHNSON, as owners of the F/V SUPERSONIC, her engines, tackle, boilers and equipment, and as owners of one certain Beck 15 foot fiberglass skiff, her engine, tackle and equipment, for limitation of liability. | A80-321 CIV |

*MEMORANDUM AND ORDER*

(Filed Nov. 15, 1985)

Consolidated Under A80-038 CIV

THIS CAUSE comes before the court on plaintiffs' motion for reconsideration of the court's August 30, 1985 minute order striking plaintiffs' demand for jury trial.

Plaintiffs correctly point out that the August 30 order misapplied the time limitation for a jury trial demand provided for in F. R. Civ. P. 38(b). *See* 5 *Moore's Federal Practice* ¶ 38.41 (1985). Accordingly, the motion for reconsideration is granted. Upon reconsideration, the court reaffirms its decision to grant the motion of defendants Johnson to strike jury demand.

The basis for plaintiffs' jury demand is the addition of certain state-law claims in plaintiffs' amended complaint dated November 2, 1984. Plaintiffs admit that these claims are cognizable in federal court solely as pendent claims, and that the only underlying jurisdictional basis for this action is admiralty. The jury demand therefore raises the question whether state-law claims that come into federal court solely by virtue of pendent jurisdiction can confer a right to jury trial in an admiralty action under 28 U.S.C. § 1333(1). This question recently arose in the Fifth Circuit, and was disposed of as follows:

> Since Taylor and Offshore Logistics are both Louisiana residents, Taylor's state law claim is cognizable in federal court either as an admiralty action or as a pendent claim to her DOHSA action. Since in either instance Taylor's case would be in federal court solely by virtue of admiralty jurisdiction, Taylor has no right to a trial by jury.

*Tallentire v. Offshore Logistics, Inc.*, 754 F.2d 1274, 1287 (5th Cir. 1985). There is no contrary authority in this circuit; the cases cited by plaintiffs all involved diversity jurisdiction or an independent right to trial by jury under the Jones Act.

Accordingly, IT IS ORDERED:

(1) THAT plaintiffs' motion for reconsideration of the court's August 30 minute order is granted; and

(2) THAT the motion of defendants Johnson to strike jury demand is granted.

DATED at Anchorage, Alaska this 15th day of November, 1985.

/s/ James A. Von der Hydt
United States District Judge

cc: Gerald W. Markham
Gordon J. Tans
Alan Schmitt
Clay A. Young
Arden Page

## APPENDIX H

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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|---|---|
| CARLISSA CHURCHILL, as the Informal Administrator of the Estate of PATRICK CHURCHILL, and DALE CARLOUGH, Plaintiffs, vs. The F/V FJORD, et al., Defendants. | A80-038 CIV |
| In the Matter of the Complaint of WILLIAM McLINN, as owner of the F/V FJORD, her engines, tackle, boilers and equipment for exoneration from, or limitation of liability. | A80-250 CIV |
| In the Matter of the Complaint of GILBERT JACK JOHNSON and JACK STEWART JOHNSON, as owners of the F/V SUPERSONIC, her engines, tackle, boilers and equipment, and as owners of one certain Beck 15 foot fiberglass skiff, her engine, tackle and equipment, for limitation of liability. | A80-321 CIV<br>*MEMORANDUM AND ORDER*<br>(Filed Dec. 3, 1985) |

Consolidated Under A80-038 CIV

THIS CAUSE comes before the court on a number of motions of the parties.

I. Plaintiffs' Motion for Dismissal of Limitation of Liability Action, etc.

The motion for dismissal of the Johnsons' limitation of liability action is unopposed, and accordingly the limitation of liability action filed on behalf of the F/V Supersonic is dismissed (Former cause A80-321). Defendants continue to have the right to raise limitation as a defense to in personam claims by way of answer. *See, e.g., In re Hurlen Construction Co.*, 551 F. Supp. 854, 856 (W.D. Wa. 1982).

Plaintiffs' motion to lift stay preventing the arrest of the F/V Supersonic is denied for the reason no such stay exists. Defendants in this action never sought a monition or injunction preventing other actions. Thus, to date, the plaintiffs' claims against the F/V Supersonic in A80-38 have never been stayed. *See also In re McLinn*, 744 F.2d 677, 684-85 (9th Cir. 1984) (had there been a perfected limitation action issue of jurisdiction over the F/V Supersonic would not have been before Ninth Circuit).

Plaintiffs' motion for determination of the in personam liability of the defendants Johnson is denied. There are no facts in this action that would require the imposition of such liability. Had defendants Johnson perfected their limitation action and requested this court issue a monition and injunction against further suits, it would be inequitable to allow them to now substitute a depreciated vessel in lieu of bond. This inequity arises from the fact that the monition and injunction prevent plaintiff from preserving the value of the vessel by exercising their traditional right to arrest it. In the instant case, plaintiffs always had the option of simply seeking

arrest of the vessel. The failure to do so was a tactical decision of plaintiffs' counsel, and the court is not inclined to relieve plaintiffs of the consequences of that decision. The cases cited by plaintiffs are inapposite. The reasoning in *The Ontario No. 2*, 80 F.2d 85 (2d Cir. 1935), assumes approval by the court of the ad interim stipulation and the presence of a monition/injunction preventing arrest. The different facts of the present case require a different result. Similarly, *The Moosabee*, 7 F.2d 501 (E.D. Va.) is based on unique facts and upon the pre-1936 version of the limitation act.[1]

II. Other Motions

Plaintiffs' motion to compel, Docket #244, is granted as follows: Defendant Russell McLinn shall supplement his responses to the interrogatory attached to plaintiffs' motion within 15 days of the date of this order. The duty to supplement interrogatories is continuing, and does not end with the close of discovery.

Plaintiffs' motion for extension of time, Docket #229, is denied for the reason that the issue of navigational lights has already been raised before this court and the Ninth Circuit, and the issue decided. *See also* Memorandum and Order of 9/23/85 at 14 (granting defendants' motions to dismiss navigational light claims).

Plaintiffs' motion for reconsideration, Docket #233, is denied. The affidavit of Captain Lochman, attached to the

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[1] The dismissal of the petition for limitation of liability in no way affects this court's prior decision regarding plaintiffs' right to a jury trial.

motion, is grossly untimely for the reason that the issues raised in it should have been raised in 1982 and then again earlier this year in response to defendants' motion for summary judgment. There is no justification for raising new issues in a motion for reconsideration at this late date.

Defendant McLinn's motion for dismissal of plaintiffs' claims based upon A.S. § 05.25.040 is granted. It is ordered the above claim is dismissed.

Plaintiffs' counsel is attempting to mislead the court in his motion to file late opposition to McLinns' renewed motion to dismiss A.S. § 5.25.040 claims. Plaintiffs' counsel has already filed one opposition, dated November 5, 1985 (*See* Docket #233). Thus, it is untrue that counsel overlooked said motion. Accordingly, the motion to file late opposition is denied.

Defendants McLinn's motion to preclude plaintiffs from calling any expert witnesses is denied. Should defendants truly seek a response to the 1982 interrogatory, the proper motion at this time would be a motion to compel.

IT IS SO ORDERED.

DATED at Anchorage, Alaska, this 3rd day of December, 1985.

/s/ James A. Von der Hydt
United States District Judge

cc: Gerald W. Markham
Gordon J. Tans
Alan Schmitt
Clay A. Young
Arden Page

**APPENDIX I**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

| | |
|---|---|
| CARLISSA CHURCHILL, as the informal Administrator of the Estate of PATRICK CHURCHILL and DALE CARLOUGH,<br><br>Plaintiffs,<br><br>vs.<br><br>The F/V FJORD, her engines, tackle, apparel, appliances, equipment, apparatus and furniture; WILLIAM McLINN, owner and operator of said F/V FJORD; RUSSEL McLINN; DAVID PANAMARIOFF,<br><br>Defendants. | |
| In the Matter of the Complaint of WILLIAM McLINN, as owner of the F/V FJORD, her engines, tackle, boilers and equipment, for exoneration from, or limitation of liability. | *FINDINGS OF FACT and CONCLUSIONS OF LAW* (Filed Apr. 24, 1986) |

A80-038 CIV

The above cause came before the court for entry of findings of fact and conclusions of law upon the issues of liability, and limitation of liability. Trial to the court was held March 10-13, 1986.

Therefore, upon full consideration of all the evidence in the case and upon the preponderance of evidence as the court has determined it, the court enters its

## FINDINGS OF FACT

1. On June 30, 1979, shortly before 1:20 a.m., two skiffs collided hear [sic] the City of Kodiak, Alaska. This accident occurred in the waters between the Cyane rock bouy [sic] and the entrance to the Near Island Channel. One skiff had exited the Near Island Channel and was proceeding generally in a northbound direction; it was operated by defendant David Panamarioff. The other skiff was returning from a beach party on Near Island and was proceeding generally in a southbound direction; it was operated by defendant Russel McLinn.

2. Patrick Churchill died as a result of injuries suffered at the time of the accident. Dale Carlough was injured.

3. The Panamarioff skiff was a Boston Whaler. It is a characteristic of this type of skiff to ride flat to the water at cruising speed. David Panamarioff was operating his skiff at a cruising speed of about 15 to 20 knots. It had no lights. David Panamarioff was alone in his skiff.

4. The Russel McLinn skiff was an aluminum work skiff. It is a characteristic of this type of skiff to ride with its bow elevated when operating at approximately 15 to 20 knots. Russel McLinn was operating his skiff at a speed of about 15 to 20 knots. It had no lights. Russel McLinn was transporting five others in his skiff. Some

were standing and were partially obstructing his forward view.

5. David Panamarioff used his Boston Whaler skiff for transportation, hunting, fishing and gathering firewood. It was his subsistence skiff. Mr. Panamarioff was returning to his home in the Native village of Ouzinkie on Spruce Island when the accident occurred.

6. The McLinn skiff was used primarily as a "seine skiff" in conjunction with the F/V FJORD. Joe Borg, a member of the F/V FJORD's crew, was the primary operator of the skiff. A few days prior to June 30 a new seventy (70) horsepower engine was installed on the skiff.

7. The accident occurred after sunset which was at 10:20 p.m. (daylight time) on June 29. The natural lighting was dusklike.

8. The Panamarioff skiff was within an area that was illuminated by the F/V EILEEN and the Whitney-Fidalgo cannery.

9. The McLinn skiff was just exiting an area of greater darkness.

10. It is the custom and practice in Kodiak for skiffs not to have the lights, although such lights are required by 72 COLREG 23(a) or (c)(i).

11. Prior to approximately 12:45 a.m. on June 30, David Panamarioff was in Tony's Bar in downtown Kodiak. He was in the bar for about forty-five (45) minutes to one hour with two friends. While there he consumed at least two and one-half beers. He then walked to his skiff in the small boat harbor and had a portion or all of another beer. More probably than not, David Panamarioff

was under the influence of alcohol at the time of the accident.

12. Russel McLinn was not a fully creditable witness. His testimony was evasive and his memory of events leading to the accident and immediately subsequent thereto obviously was slanted toward recall of the incident as such benefited him. In many major areas his testimony was not worth of belief.

13. Before the accident Russel McLinn had attended a beach party where intoxicating liquor was readily available. He also had smoked some quantity of marihuana [sic] prior to and more probably than not during the beach party. Russel McLinn was intoxicated at the time of the accident.

14. Because of intoxication, neither David Panamarioff or Russel McLinn exercised reasonable care prior to or at the time of the accident.

15. David Panamarioff and Russel McLinn were negligent, and their combined negligence was the cause of the accident.

16. No creditable evidence adequately supports plaintiffs' allegations that William McLinn, as owner and operator of the F/V Fjord, negligently entrusted the skiff involved in the accident to his son Russel McLinn.

17. No creditable evidence adequately supports plaintiffs' further allegations as to the liability of William McLinn, owner and operator of the F/V Fjord upon the doctrines of respondeat superior, family purpose, or in rem.

18. At the time of the accident tests indicated that Patrick Churchill had a blood alcohol content of .189%. He was severely intoxicated and his motor and mental abilities were severely impaired.

19. Because of his severe intoxication, Patrick Churchill violated the duty of reasonable care owed himself and others and therefore he was contributorily negligent.

20. Patrick Churchill's contributory negligence, combined with the negligence of Russel McLinn and David Panamarioff was the proximate cause of his death.

21. Shortly after the accident, Dale Carlough was treated at the Kodiak Island Hospital for alcohol intoxication and the injuries sustained in the accident. Creditable evidence establishes that he was very intoxicated.

22. Because of his intoxication, Dale Carlough violated the duty of reasonable care owed himself and others and therefore he was contributorily negligent.

23. Dale Carlough's contributory negligence, combined with the negligence of Russel McLinn and David Panamarioff was the proximate cause of his injuries.

24. The percent of comparative negligence of each of two plaintiffs and each of the three defendants is apportioned as follows:

| | |
|---|---|
| Patrick Churchill | 20% |
| Dale Carlough | 20% |
| Russel McLinn | 35% |
| David Panamarioff | 25% |
| William McLinn and the F/V Fjord | 0% |

## CONCLUSIONS OF LAW

1. This court has jurisdiction under the general maritime and admiralty law of the United States.

2. Russel McLinn was negligent.

3. David Panamarioff was negligent.

4. Patrick Churchill was contributorily negligent.

5. Dale Carlough was contributorily negligent.

6. William McLinn, owner and operator of the F/V Fjord and the F/V Fjord are not liable to plaintiffs under the doctrines of negligent entrustment, family purpose, respondeat superior, or in rem.

7. William McLinn, owner and operator of the F/V Fjord and the F/V Fjord are entitled to exoneration from liability.

8. The percent of comparative negligence of each party is that set forth in finding of fact #24.

Proposed judgment form upon the issues of liability and limitation of liability forthwith may be prepared by defendant William McLinn's counsel for presentation to the court.

Following entry of said judgment, any party may move to set the case for trial upon the issue of plaintiffs' damages.

DATED at Anchorage, Alaska, this 24th of April, 1986.

/s/ James A. Von der Hydt
United States District Judge

cc: Gerald W. Markham
Clay A. Young
Alan L. Schmitt
Gordon J. Tans
Arden E. Page
James S. Crane

## APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

| | |
|---|---|
| CARLISSA CHURCHILL, as the informal Administrator of the Estate of PATRICK CHURCHILL and DALE CARLOUGH,<br><br>Plaintiffs,<br><br>vs.<br><br>The F/V FJORD, her engines tackle, apparel, appliances, equipment, aparatus [sic] and furniture; WILLIAM McLINN, owner and operator of said F/V FJORD; RUSSEL McLINN; DAVID PANAMARIOFF,<br><br>Defendants. | *ORDER AMENDING FINDINGS OF FACT AND CONCLUSIONS OF LAW*<br><br>(Filed May 2, 1986) |
| In the Matter of the Complaint of WILLIAM McLINN, as owner of the F/V FJORD, her engines, tackle, boilers and equipment, for exoneration from or limitation of liability. | |

A80-038 CIV

The court entered its findings of fact and conclusions of law in this case on April 24, 1986.

Inadvertently, a necessary finding and conclusion were omitted.

Therefore, IT IS ORDERED:

1. That said findings of fact be amended by adding finding number 25:

25. No adequate proof has been established which entitled plaintiffs to punitive damages.

2. That said conclusions of law be amended by adding conclusion number 9:

9. Plaintiffs are not entitled to punitive damages.

DATED at Anchorage, Alaska, this 2nd day of May, 1986.

/s/ James A. Von der Hydt
United States District Judge

cc: Gerald W. Markham
Clay A. Young
Alan L. Schmitt
Gordon J. Tans
Arden E. Page
James S. Crane

## APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

CARLISSA CHURCHILL, as the informal Administrator of the Estate of PATRICK CHURCHILL and DALE CARLOUGH,

Plaintiffs,

vs.

The F/V FJORD, her engines, tackle, apparel, appliances, equipment, apparatus and furniture; WILLIAM McLINN, owner and operator of said F/V FJORD; RUSSEL McLINN; DAVID PANAMARIOFF,

Defendants.

---

In the Matter of the Complaint of WILLIAM McLINN, as owner of the F/V FJORD, her engines, tackle, boilers and equipment, for exoneration from or limitation of liability.

JUDGMENT

(Filed May 6, 1986)

A80-038 CIV

The above cause having been tried to the court on the issues of liability and limitation of liability on March 10-13, 1986, and the court having entered findings of fact and conclusions of law on April 24, 1986; and the court having found that defendant Russel McLinn was 35% negligent, David Panamarioff was 25% negligent, and

that plaintiff Dale Carlough and plaintiffs' decedent Patrick Churchill were each 20% contributorily negligent; and the court finding that William McLinn was not negligent or otherwise personally or vicariously liable, and that the F/V FJORD is not liable *in rem*, it is therefore

ORDERED, ADJUDGED AND DECREED:

1. That plaintiff Carlissa Churchill shall have judgment against defendants David Panamarioff and Russell McLinn, jointly and severally, with her recovery reduced in proportion to Patrick Churchill's negligence, with damages to be determined in a subsequent trial;

2. That plaintiff Dale Carlough shall have judgment against defendants David Panamarioff and Russell McLinn, jointly and severally, with his damages reduced in proportion to this negligence, with damages to be determined in a subsequent trial;

3. That plaintiffs' punitive damage claims are dismissed;

4. That plaintiffs' claims against defendant William McLinn are dismissed, and William McLinn shall have judgment against the plaintiffs, jointly and severally, for such costs and attorneys' fees as the court may award upon proper application;

5. The plaintiffs' claims against the F/V FJORD are dismissed.

DATED at Anchorage, Alaska this 5th day of May, 1986.

/s/ James A. Von der Hydt
United States District Judge

Costs taxed in favor of defendants William McLinn and the F/V Fjord in amount of $1,294.34 – 5-23-86.

/s/ Name Illegible
Deputy Clerk

cc: Gerald W. Markham
Clay A. Young
Alan L. Schmitt
Gordon J. Tans
Arden E. Page
James S. Crane

cc: Resent Cnsl w/added costs

## APPENDIX L

MINUTES OF THE UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

CARLISSA CHURCHILL, et al. vs. The F/V FJORD, et al.

THE HONORABLE JAMES A. VON DER HEYDT CASE NO. A80-038 CIV

| Deputy Clerk | Reporter | Recorder |
|---|---|---|
| X Colleen Cannon | _ Janis Roller | _ Tracy Royce |
| _ Ida Romack | _ _____ | _ Linda |
| _ Marvel Hansbraugh | | _ Christensen |
| _ David Thomas | | _ Charles |
| _ _____ | | _ Farmer |
| | | _ |

APPEARANCES: PLAINTIFF:

DEFENDANT:

PROCEEDINGS: MINUTE ORDER FROM CHAMBERS

The motion of defendants McLinn and the F/V FJORD for entry of final judgment pursuant to F.R. Civ. P. 54 (b) (Docket No. 357) is granted. This court's judgment filed May 6, 1986 (Docket No. 346) is amended in that line 8 of page 2 of said judgment shall read:

> FJORD is not liable *in rem;* and the court finding that there is no just reason for delay of entry of partial final judgment pursuant to F. R. Civ. P. 54(b), and that any appellate review of such partial final judgment on the issue of liability will not require the appellate court to address legal or factual issues similar to those still to be decided by this court; it is therefore

Plaintiffs' motion to amend findings pursuant to F. R. Civ. P. 52, 59 is denied.

Plaintiffs' motion for stay of judgment (Docket No. 348a) is denied as moot. Plaintiffs' alternative motion to set supersedeas bond (Docket No. 348a) is denied as premature.

cc: Crane – COPELAND
Markham – MARKHAM
McLinn – DELANEY
Young/Lazar – DELANEY
Wildridge/Schmitt – ALSC
Tans/Powell – HUGHES
Page – BURR

DATED: JUN 17, 1986 INITIALS: _____
C.F. No. 1 Deputy Clerk

## APPENDIX M

CLAY A. YOUNG
Delaney, Wiles, Moore,
Hayes & Reitman, Inc.
1007 W. Third, Suite 400
Anchorage, Alaska 99501

Attorney for Defendant
WILLIAM MCLINN

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

| | |
|---|---|
| FRANK CHURCHILL, as the Informal Administrator of the Estate of PATRICK CHURCHILL, and DALE CARLOUGH,<br><br>Plaintiffs,<br><br>vs.<br><br>The F/V FJORD, her engines, tackle, apparel, appliances, equipment, apparatus and furniture; WILLIAM MCLINN, owner and operator of said F/V FJORD; RUSSEL MCLINN, DAVID PANAMAROFF; The F/V SUPERSONIC, her engines, tackle, apparel, appliances, equipment, apparatus and furniture; GILBERT JOHNSON, part owner and/or operator of said F/V SUPERSONIC; JACK JOHNSON, part owner of said F/V SUPERSONIC; and MICHAEL BRUCE CHICHENOFF,<br><br>Defendants. | No. A 80-038 Civ.<br><br>*ANSWERS TO INTERROGATORIES TO WILLIAM MCLINN* |

Plaintiff's Exhibit 8 adm
A80-38 Civ

COMES NOW Defendant WILLIAM MCLINN, by and through his attorneys and answers the Interrogatories to William McLinn Defendant as follows:

1. Were you absent from Kodiak, Alaska, on the date of the accident in question in this case?

ANSWER: Yes.

2. If the answer to Question Number One is yes, please state where you were and when you left Kodiak and when you returned.

ANSWER: I left Kodiak on approximately June 26 through June 28, and returned to Kodiak on July 5, 1979. I was in Seward during that period of time.

3. Who was in charge of the F/V FJORD in your absence?

ANSWER: My son Russell [sic] McLinn lived on the boat during the time I was absent and had authority to watch over it in the harbor.

4. State what inquires you made of Defendant Russel McLinn in your employment of him with respect to his competency as a crewman.

ANSWER: My son had worked off and on for me as a crewman and on fishing ventures since he was six years old.

5. Were you aware of a beach party that Russel McLinn planned to attend or that the F/V FJORD's skiff would be used to transport people to it?

ANSWER: I was unaware of any beach party, or that anyone would attend it, or that the FJORD's skiff would be used to attend it.

6. If the answer to Question Number Six is yes, state whether you knew whether drinking was going to occur at said party.

ANSWER: Not applicable.

7. Did Russel McLinn have permission to use the F/V FJORD's skiff at night?

ANSWER: I told my son before I left Kodiak that I saw no reason for him to use the skiff at all.

8. Were you aware the F/V FJORD's skiff had no lights?

ANSWER: Yes.

9. Please describe the horsepower on the F/V FJORD's skiff at the time of the accident in question.

ANSWER: 70 hp.

10. Who mounted the engine on the F/V FJORD'S skiff?

ANSWER: I either did it myself or had it done.

11. Where was the engine mounted on the F/V FJORD's skiff, and where was it purchased?

ANSWER: It was purchased through Peter Pan Seafoods, and then mounted on the skiff in the Kodiak boat harbor.

12. When the engine mounted on the F/V FJORD's skiff was purchased, did the seller know the specifications of the skiff on which it was to be mounted?

ANSWER: Probably not.

13. Was the horsepower of the engine mounted of the F/V FJORD's skiff excessive?

ANSWER: No.

14. Where did you purchase the F/V FJORD?

Answer: In Kodiak.

15. What was the purchase price of the F/V FJORD?

ANSWER: $35,000.00.

16. If the purchase was in the form of a contract, please attach a copy of same.

ANSWER: Please see attached.

17. If the F/V FJORD was financed, was an appraisal done to obtain financing; and if so, please attach copy of same.

ANSWER: See attached.

18. List the purchase of the F/J [sic] FJORD's skiff and its motor, and the F/V FJORD's seine and its power block if purchased separately from the F/V FJORD.

ANSWER: I made the skiff myself in 1974 for approximately $900.00. It is probably work $500.00 to $1,000.00 at the present time. The motor cost $1,738.00. The FJORD's seine was purchased separately for $10,200.00 The FJORD had a power block on it when

purchased, which I replaced for one costing $3,000.00 obtaining $1,000.00 credit for the old power block.

19. State the amount of insurance carried on the hull of the F/V FJORD.

ANSWER: $100,000 liability insurance, $35,000 hull insurance.

20. State the current market value and current replacement value of the F/V FJORD, skiff, seine, powerblock, and any other equipment on board the F/V FJORD at the time of the accident in question in this case.

ANSWER: Please see attached documents.

DATED this 29 day of July, 1980.

/s/ William McLinn
WILLIAM MCLINN

SUBSCRIBED AND SWORN TO before me this ___ day of ___, 1980.

/s/ _____
Notary Public in and
for Alaska
My Commission Expires: ___

## APPENDIX N

DEPOSITION OF WILLIAM McLINN

APPEARANCES:

For Plaintiff:

GERALD MARKHAM, ESQ.,
Box 806
Kodiak, AK 99615

For Defendants F/V *Fjord* and William McLinn:

MICHAEL MOXNESS, ESQ.
Delaney, Wiles, Hayes,
Reitman & Brubaker
1007 West 3rd Avenue
Anchorage, AK 99501

For Defendants F/V *Supersonic*, Jack Gilbert Johnson, and Stewart Jack Johnson:

JAMES M. POWELL, ESQ.
Hughes, Thorsness, Gantz,
Powell & Brundin
509 Third Avenue
Anchorage, AK 99501

For Defendants Michael Chichenoff:

NELSON G. PAGE, ESQ.
Burr, Pease & Kurtz, Inc.
810 N Street
Anchorage, AK 99501

Also Present:

Jack Gilbert Johnson
Stewart Jack Johnson

PURSUANT TO NOTICE, the deposition of WILLIAM McLINN was taken on the 10th day of December, 1981 commencing at the hour of 10:30 a.m., thereof, before Deborah L. Soucy, Notary Public in and for the State

of Alaska and electronic reporter for Island Secretarial Services at the office of Island Secretarial Services in Kodiak, Alaska.

(p. 33) Q. When you left, when was the – what was the status of the Pink season, if you will?

A. Usually it starts the tenth, twelfth, fourteenth of July

Q. And when did you leave to the best of you recollection?

A. The last part of June, I believe.

Q. When had you come to Kodiak before this?

A. Maybe a month.

Q. And what was your purpose in coming a month before?

A. Purchasing the boat.

Q. And did you have to do anything to the boat when you arrived?

A. Yeah.

Q. What was that?

A. Set it up for fishing.

Q. Was that done when you left?

A. Right.

Q. When you left, was the skiff in the water?

A. Yeah.

Q. Attached to the end of the boat, to the side of it?

A. I believe.

Q. Did your son have a car when you left?

A. If he did – I don't believe so.

## APPENDIX O

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ALASKA

| | | |
|---|---|---|
| FRANK CHURCHILL, as the Informal Administrator of the Estate of PATRICK CHURCHILL, and DALE CARLOUGH, | ) | |
| Plaintiffs, | ) | No. A 80-038 |
| vs. | ) | Civil |
| The F/V FJORD, her engines, tackle, apparel, appliances, equipment, apparatus and furniture; WILLIAM MCLINN, DAVID PANAMAROFF; The F/V SUPERSONIC, her engines, tackle, apparel, appliances, equipment, apparatus and furniture; GILBERT JOHNSON, part owner and/or operator of said F/V SUPERSONIC; JACK JOHNSON, part owner of said F/V SUPERSONIC; and MICHAEL BRUCE CHICHENOFF, | ) | |
| Defendants. | ) | |

DEPOSITION OF RUSSELL MCLINN

PURSUANT TO NOTICE, the deposition of RUSSELL MCLINN was taken on Monday, the fifth day of January, 1981, commencing at the hour of 9:00 a.m., thereof, before DEBORARH L. SOUCY, Notary Public in and for the

STATE of Alaska, and Electronic Reporter for Island Secretarial Service, at the office of Island Secretarial Service, in Kodiak, Alaska.

(p. 8) A. Yes.

Q. So you were the only person in town at the time of the accident?

A. Yes.

Q. Who was in charge of the boat then?

A. You might say I was, watching the boat, making sure it stayed afloat.

Q. Did you father give you any instructions? Your father was the skipper?

A. Yes.

Q. Did your father give you any instructions with regard to caring for the boat when he left?

A. Not that I can remember no. Just, you know, check the pumps and make sure it's plugged in, the electricity, batteries charged up and that.

Q. All right . . .

A. That's all I can remember, think of.

Q. Where you authorized to use the boat's skiff?

A. Not that – no. I don't think so.

Q. Were you told you couldn't use the boat's skiff?

A. I know better, you know, I know I shouldn't have used the skiff, but I did.

Q. Were you ever told you couldn't use the skiff?

A. Not at any specific time that I can remember. No.

Q. All right, directing your attention now to the night of

---

## APPENDIX P

W.R. McLINN – DIRECT

(p. 354) * * *

BY MR. YOUNG:

Q. All right, Russel, did your father and the rest of crew leave Kodiak at some point before the accident that you were in?

A. Yes, they did.

Q. And do you recall how many days before the accident it was that they left?

A. From my memory, I can't really recall, no.

Q. Do you remember saying in your deposition, a week or two?

A. Yes, I do. But I don't believe it was quite that long.

Q. Okay. And you stayed in Kodiak. Is that right?

A. Yes.

Q. Do you know why they left?

A. I believe for the 4th of July weekend.

(p. 355) Q. And why didn't you go with them?

A. 'Cause my place of residence was Kodiak.

Q. Okay. Did they all leave together?

A. As far as I know the three of them left together, yes.

Q. The three of them being Joe Borg, William McLinn –

A. Yes. And my brother Chris, right.

Q. And were you told anything when they left, that you can recall, about anything to be with the FJORD or the skiff?

A. The only thing I remember being told before they left was to keep up the boat, paint the floorboards, the deck boards, and whatnot. That kind of thing.

Q. Okay. Paint the floorboards, and –

A. Just work on the boat.

Q. Work on the FJORD?

A. I don't specifically remember them telling me not to use the skiff.

Q. Okay.

A. But – I don't remember, really.

Q. Okay. And do you remember where the conversation took place that you have talked about – painting the floorboards and the deck boards and generally keeping up the boat?

A. I would imagine it was on the boat itself. I – you know, other than that, I couldn't really say for sure.

Q. Okay. Did you participate in putting the seventy-horse engine on the skiff?

* * *

(p. 360) go to Seward?

A. I – I can't – I'm having a hard time understanding the question.

Q. Okay. Did you think you could use the skiff, when they left you with the FJORD?

A. Well, I knew I needed permission. There was nobody to ask, you know. And it was 4th of July weekend, so –

Q. Well, did you think you could use it, or think that you couldn't use it?

A. I knew I needed permission, so, I didn't – you know, I just used it.

Q. You did use it, in fact.

A. I did use it.

Q. All right. And you didn't have permission from your father?

A. That's true.

Q. Were – when you used the skiff, after your father left that weekend, what did you use it for?

A. A couple of buddies came down to the boat and wanted to go to a party, over to a beach. And they bugged me and bugged me and bugged me, and I kept telling them no, no, no. And finally, being buddies and all, I finally got talked into it, and I said okay, I'll go.

* * *

## APPENDIX Q

BORG – DIRECT

BY MR. YOUNG:

(p. 283) * * *

Q. Now, this skiff was to be used by you during the fishing season. Is that right?

A. Basically, yeah.

Q. Was there a policy that Mr. McLinn had, that you were aware of, with regard to anyone else using the skiff, other than you as the skiffman?

A. I was supposed to be the only guy who touched it, as far as it went, because everything was brand new, and I was the skiffman. And usually the skiffmen, in general, stay in their boat, and they don't like anybody playing with their toys.

Q. Okay. And how did you know that that was the policy, and that that was the way that your skiff was to be used?

A. Well, every skipper basically has their own policies. They run their own boat. So – it wasn't a – it's not a strict deal. It's just a kind of a – an assumed position.

Q. Was this discussed with Mr. McLinn? Is this something that you and he discussed, with William McLinn?

A. I can't remember. We never had any in-depth conversations about it. It was a pretty routine situation, you know. Every boat has a skiffman, and the skiffman takes care of his skiff, and the skipper's in charge of everything.

(p. 284) Q. Was there any understanding or policy with regard to whether Russel or Chris could use the skiff?

A. Not that I know of.

Q. Okay. And this is some – maybe I'm not talking about the right time. I'm talking about before you left tc go to Seward, while you were all working on the boat. during that period of time, was there any policy –

A. After we put the boat in, and everything was ready to go, no one was to touch the boat.

Q. Okay. Now, how do you know that?

A. Because I remember him saying so, and I remember telling him myself. I told him to stay out of the skiff, because I didn't want him to touch it.

Q. Okay. Now, who said so? You say you remember "him" saying so.

A. Bill told Russel and I told Russel.

Q. What did you tell him?

A. Well, you know, I was just kind of like the echo.

Q. Well, what was told?

A. Do not touch the skiff.

Q. And when was –

A. Keep out of the skiff.

Q. When was that told to him?

A. Before we left for Seward.

Q. Do you remember where you were when you had this (p. 285) conversation?

A. We were on the dock, just leaving. It was like a, you know, "Stay on the boat, be good, don't touch the skiff, and we're leaving. See you later." Basically that's what it was. It wasn't – you know, we didn't rehearse that or anything like that. So – calm, and everything.

Q. And was anyone else present when – on the dock?

A. Just us, the crew, as far as I remember. You know, there was probably other guys walking around, but I don't remember –

Q. Well, was Chris there?

A. Yeah.

Q. And then you and Bill and Chris left to get on the plane.

A. Yep.

Q. Russel stayed there.

A. Yeah.

Q. What was Russel, if you know, what was he to be doing –

A. Just keep an eye on –

Q. – with the boat?

A. Keep an eye on the boat, you know, so nobody stole anything, basically. And just make sure the battery stayed up so the pump would pump the water out.

Q. Do you know if he was living on the boat?

A. I figured he was. He wouldn't have anywhere else to live on Kodiak then.

CROSS-EXAMINATION

(p. 290) BY MR. MARKHAM:

Q. Mr. Boggs [sic], when did you come to Kodiak in the summer of '79?

A. It was probably in the middle of June. We started work on the boat around June sometime. I don't know exactly.

Q. Was Russel there when you arrived?

A. I don't remember. I think he was there. I think we were all there to work on the boat.

Q. You'd known Russel before that summer. Is that correct?

A. I knew who he was. We weren't friends, or anything like that.

Q. You'd never worked with him before?

A. No.

Q. How did you know him?

A. I had worked for Bill previously. I knew he had a family.

Q. And had you met his son before?

A. Yeah, I'd seen him around.

(p. 293) A. No.

Q. And then on Friday afternoon, did you have a conversation with me and then make a tape recorded statement about the accident?

A. I had a conversation with you, yes. After you told me you were representing Bill.

Q. Yes? Is that what you understand?

A. That's what I understood, or I wouldn't have talked to you at all.

Q. I see. And it's your testimony that I said that, or you understood that?

A. That's what I understood.

Q. Okay.

A. I asked you if you were the prosecutor, or representing Bill. And you said you were not the prosecutor. You told me you were – Bill fired his other lawyer and you were taking over the case. That's what I understood you to say.

Q. Did I under – could I have said Mr. Bradbury is taking over the case?

A. That could have been, yeah.

Q. All right. And I'm not the prosecutor. Are you aware of that?

A. Well, I am now, but –

Q. Okay. And that would have mattered, huh? You would have said something differently, or not talked to me, if you had (p. 294) known that?

A. Some, it would have. Because I don't like to, you know – I didn't know what to talk about, who to talk to about anything, you know. I don't know what –

Q. Or what to say.

A. – what's going on in the whole situation. You're the one that first got to talk to me. You put thoughts in my mind, and then you just asked me to go over 'em with you.

Q. Uh-huh.

A. You know, if – you were the first guy –

Q. You would have said it differently, you're saying, if Mr. McLinn had talked to you first.

A. Well we could have talked. But, you know, I don't recollect the whole situation. You were the first guy to bring it up to me in seven or eight years. And the statements you said sounded close. I don't know what, you know – I don't know what could have came about.

Q. All right.

A. You put thoughts in my mind. You made statements you asked me to –

Q. Was anyone else present when this conversation occurred?

A. No.

Q. You're sure of that?

A. Yeah.

Q. Wasn't the conversation on a conference phone?

(p. 295) A. No. I have a little tape recorder, like, basic – you know, phone answering service.

Q. No, but on my end, wasn't it on a conference phone?

A. Oh. I believe so. I thought I heard you talk to a secretary or somebody.

Q. I see. There might even have been another party in this conversation?

A. I don't know. I have no idea.

Q. Well, you know it was on a conference phone, and you heard some words spoken to a secretary, did you not?

A. Yeah.

Q. In fact, they're on the tape, aren't they?

A. Who knows? I don't know.

Q. Well, let's listen to the tape, and see –

A. Let's listen to the tape.

Q. – if you can recollect the conversation.

MR. MARKHAM: It might help if I had the tape.

Could I have the tape marked as the next number exhibit?

THE COURT: Plaintiff's next in order. That's 6?

THE CLERK: Yes, Your Honor.

(Plaintiff's Exhibit 6 was marked for identification.)

(Plaintiff's Tape Exhibit 6 for Identification was played as follows.)

(p. 296) "MR. MARKHAM: Okay. I can see where [indiscernible] problem, though. It's going to go off here in a second.

"VOICE: No. You've got the whole tape.

"MR. MARKHAM: No, it's going the other way.

"VOICE: No, it's not. [Beep] It's going this way.

"MR. MARKHAM: Okay. All right. This is Joe Borg? Can you hear me now?

"MR. BORG: Yes.

"MR. MARKHAM: All right.

"MR. BORG: I can hear you loud and clear.

"MR. MARKHAM: Great. I'm sorry to inconvenience you here. Just – [Beep]. This is Gerry Markham. I'm calling you from Kodiak, Alaska, and I understand that – let's make it clear. We're making a tape recording of – of your involvement in the accident of – [Beep] – involving Russel McLinn back in 1979 when you and Russel and his father were all in the boat together.

"MR. BORG: Yeah, I understand.

"MR. MARKHAM: All right. And you understand this is being recorded, and might be used in Court? [Beep].

"MR. BORG: I do.

"MR. MARKHAM: All right. Mr. Borg, it's my understanding from having just talked to you, that you (p. 297) left for Seward before – [Beep] – accident in question happened?

"MR. BORG: Yes, that's true. I left with Bill McLinn for Seward.

"MR. MARKHAM: All right. And who did you leave in charge of the boat?

"MR. BORG: We left Russel, his son, in charge of the boat and all it's equipment. [Beep].

"MR. MARKHAM: All right. And when you left for Seward, did Russel McLinn have – had he used the boat before that time? [Beep].

"MR. BORG: Yes, he had. Quite a few times. He was experienced as well as I was on the skiff.

"MR. MARKHAM: Okay. And prior to leaving, did you hear at any time – [Beep] – his father had said that he could not use the boat – the skiff?

"MR. BORG: Not to my recollection.

"MR. MARKHAM: All right. And could you – could you say – [Beep] – the beeper keeps interrupting, but – as far as whether Russel had the right to use the skiff in his father's absence, what would – what would be your beliefs on that? [Beep].

"MR. BORG: I would just say that it was up to his father. I had no say in the matter, you know. His father may have given him instructions without my (p. 298) presence, as far as I know. He was the captain of the boat, and whatever he said was law to me, so – [Beep] – him and his sons – I don't know what to say what to say on the matter. His father may have given instructions that I don't know anything about.

"MR. MARKHAM: Okay. Okay, that's what I'm asking you about. Assuming his father did not give him any instructions, what would be your – [Beep] – to whether he had the right to use the skiff while his father was gone?

"MR. BORG: Well, I don't see why he couldn't, you know. It – a person to stay on the boat for a whole weekend, it gets awfully boring just hanging around the dock there. For him to take a ride on the skiff seems perfectly natural to me. I've been – [Beep] – myself. So, as far as it goes, I don't see anything wrong with it. He was experienced with the thing, like I told you, and I don't see anything wrong with taking a boat for a ride, if a guy wants to take it for a ride.

"MR. MARKHAM: All right. [Beep]. So as far as you knew, of course you didn't hear anything as far as what your [sic] father said to Russel, but as far as you knew, it would have been all right for Russel to use the boat without asking his father.

(p. 299) "MR. BORG: I would way – well, sure. You know – [Beep] – like I say, I don't see any problem with it.

"MR. MARKHAM: Okay. And Mr. Borg, you're not – you're now in California. Is that correct?

"MR. BORG: Yes.

"MR. MARKHAM: And it would be difficult, if not impossible, for you to come to the trial in this matter?

"MR. BORG: It would be – [Beep] – now, because, like I say, I have a business to take care of, and there's no way that I can leave it without – there's no one responsible enough to take charge. So I've got to stay with it, unfortunately, or I'd be happy to come.

"MR. MARKHAM: All right. Would it be possible for you to – [Beep] – give a deposition in California if need be, in this matter?

"MR. BORG: Sure. [Indiscernible] if I were have to go down, or I can send you a written

deposition. Whatever you want. But there's no way I could make it to Alas- – [Beep].

"MR. MARKHAM: Okay. Let me conclude the tape recording here, with your permission, unless you have something you want to add to this.

(p. 300) "MR. BORG: No, not really. Nothing that I could remember that would be important, and – [Beep]. The whole thing is a little bit foggy to me. But otherwise, no, thank you. There's nothing more I'd like to add.

"MR. MARKHAM: Okay. I'm going to conclude this and make sure that I got a tape recording of what you were saying there. And this is your best testimony, to the best information – [Beep] – is that true?

"MR. BORG: Best of my knowledge, that's it.

"MR. MARKHAM: Okay. Is this about what you would testify in a court of law if you were testifying?

"MR. BORG: Yep. Yes, sir.

"MR. MARKHAM: Okay. I'm going to turn this off and – [Beep] – go from there. Just hang on a minute. Please don't hang up.

"MR. BORG: All right. I'll hold on."

(Tape playing concluded.)

BY MR. MARKHAM:

Q. Mr. Borg, at the time that you made those statements on the tape, did you believe them to be true?

A. I didn't remember everything fully.

Q. That's not what I asked you. At the time you made the statements on the tape –

A. Yes, to my knowledge, that is –

(p. 301) Q. – did you believe them to be true?

A. Yes.

MR. MARKHAM: No further questions, Your Honor.

THE COURT: Anything further, Mr. Young?

MR. YOUNG: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. YOUNG:

Q. Mr. Borg, is that the entire conversation you had with Mr. Markham?

A. No, it's not. It's about –

Q. Would you relate the rest of the conversation, please?

A. It's just mainly in the beginning, when he was introducing himself, and saying he was involved in the case. And he never made it totally clear to me who he was, and what he was representing.

Q. Did you ask him who he was representing?

A. Yeah, I did.

Q. What did you ask him?

A. He talked around it.

Q. What did you ask him?

A. I asked him how – "Who are you? Are you the prosecutor? are you the lawyer for Bill? I don't know who you are."

Q. What did he say?

A. And then he mentioned something – now that he – you say it, Mr. Woodbury or Bradbury, whichever it is – but he said (p. 302) you – he told me Bill fired his lawyer, and that you – he was involved with the case now. So I assumed that he was Bill's lawyer.

Q. Okay. Now, did you talk with anybody about the case – about the accident – since the accident happened, or since that summer, until Mr. Markham called?

A. No. No, not at all. He was the first person I had talked to since the whole situation –

Q. Now, you've indicated that what you said is – on the tape – at the time you said it, you believed it to be correct. Is that right?

A. Yeah, I believed it to be correct, but –

Q. Do you now believe it to be correct?

A. No.

Q. Why not?

A. Just one part of it. The part –

Q. And what –

A. We were on the dock, all together. Because it just – it came back to me, after seven years, thinking about it. I still don't remember everything in the whole situation in detail. But I remember being on the dock with Bill, and

him saying it. And the motor and everything was brand new. It only makes perfect sense to me that he would say, "Don't touch it." You know, we spent a lot of money and time on that thing. We had to have it ready for fishing. And I was picky about it myself. (p. 303) I insisted, and I went with it. I was glad that he said it.

Q. You now remember that that's what occurred?

A. Yeah.

Q. You know, you're under oath now.

A. I'm under oath, and I swear that that's what happened then. And there's no reason that I'd want to lie.

Q. Did you work on the vessel, the ERIN, the year before you worked on the FJORD?

A. Uh-huh. Yes.

Q. Did you work on that vessel with Russel McLinn?

A. I don't remember if Russel was there or not. I just remember the man who owned the boat who had a heart attack with us. I remember Tony Chapin was on the boat. I don't remember if Russel was there or not. To tell you the honest truth, I don't.

Q. You said that you don't recall working with Russel before the summer that the FJORD was put in the water, and you fished. Is that correct?

A. No, I don't.

Q. Is it that you don't remember it, or that you didn't work with him?

A. I don't remember. I'm not sure.

Q. But you do remember seeing him operate the skiff and being – and working around the FJORD.

A. Yeah, he was – yes.

* * *

W.H. McLINN – CROSS

(p. 557) and 1978 it was in the name of James Bays.

Q. So you transferred it to him.

A. And that was part of the condition that went with him purchasing the vessel ROVER.

Q. Okay. As far as '78 and '79 too, fishing was pretty poor in Kodiak, wasn't it?

A. 1978 I did a $49,000 gross.

Q. '79?

A. I'm not right sure. I fished quite a bit of fish in that year.

Q. This whole operation that you had was kind of a family operation, was it not? Fair to say?

A. I generally had the responsibility of my sons, yeah.

Q. This was something you did to keep your sons kind of close to you in the summer time.

A. You might say that.

Q. Okay. And you hadn't seen Russel all that much before this particular summer. Isn't that true?

A. That's probably true.

Q. And when it came time to go wherever you went, before the 4th of July weekend, you left Russel there in charge of the boat.

A. I did.

Q. And he had the duties of a crewman. He some painting to do.

(p. 558) A. I would assume so, yes.

Q. Okay. And the reason why you left Russel there as opposed to one of your other sons was because, as you testified a moment ago, his friends were there. He didn't want to go to Seward.

A. It was his choice to stay there, for his reasons.

Q. Okay. Your testimony on direct examination was, it was because his friends were there.

A. That's what he told me. He says, "I don't want to go. My friends are here."

Q. And when you left, you left the keys in the skiff, and a key in the seine boat.

A. I did.

Q. A key to the skiff in the skiff, and a key to the skiff in the seine boat.

A. I did.

Q. And it's your testimony that just as you were leaving, you told Russel, "I see no reason for you to use the skiff."

A. I told him that.

Q. Why did you leave the keys?

A. Why did I leave the keys in it? Why should I take the keys out?

Q. Well, aren't you worried of theft, or something like that at least?

A. You don't need a key to steal a boat.

(p. 559) Q. Well, it helps, doesn't it?

A. Not if a person wants to steal it.

Q. Okay. Would you concede that there might be reason that Russel might need to use the skiff?

A. If there was fire he might want to tow something away, you know. Who knows?

Q. So it was really up to him, whether he needed to use the skiff or not.

A. Probably not.

Q. He was in charge of it, wasn't he?

A. He was in charge of taking care of the boat.

(Pause.)

Q. Do you have any other plane ticket indicating, sir, that you went to Anchorage during any other time during that summer?

A. I'd have to look at these records.

Q. Well, they're here, aren't they?

A. These records you've looked at.

Q. Well, you – they're your records.

A. You're asking me how many times I flew to Anchorage?

Q. I'm asking if you've got any record that shows that you ever went back to Anchorage, so that you can somehow get to use the rest of that portion of the ticket, on a different date.

A. I don't know.

Q. Well, could you look at it?

A. Do you want me to look to see if there's more than one

* * *

## APPENDIX R

STATUTES SUBSTANTIALLY IDENTICAL
TO AS 05.25.040

ALASKA STATUTE:

Sec. 05.25.040. OWNER'S CIVIL LIABILITY. The owner of a watercraft is liable for injury or damage caused by the negligent operation of the owner's watercraft whether the negligence consists of a violation of a state statute, or neglecting to observe ordinary care in the operation of the watercraft as the rules of the common law require. The owner is not liable, however, unless the watercraft is used with the owner's express or implied consent. It is presumed that the watercraft is being operated with the knowledge and consent of the owner, if at the time of the injury or damage, it is under the control of the owner's spouse, father, mother, brother, sister, son, daughter, or other member of the owner's immediate family. This chapter does not relieve any other person from a liability which the person would otherwise incur, and does not authorize or permit recovery in excess of injury or damage actually incurred. (§ 8 ch 63 SLA 1961)

ALASKA STATUTE:

SEC. 05.25.100. DEFINITIONS. As used in this chapter, unless the content otherwise requires,

(1) "department" means the Department of Public Safety;

(2) [Repealed, 5 3 ch 60 SLA 1976.]

(3) "operate" means to navigate or otherwise use a watercraft for recreational purposes as opposed to business, subsistence or commercial purposes;

(4) "watercraft" means every description of vessel, other than a seaplane on the water, used or capable of being used as a means of transportation on water and devoted to recreational pursuits unless otherwise expressly provided in this chapter; and excepting vessels having a valid marine document issued by the United States or foreign governments;

(5) "waters of the state" means all waters, fresh or salt, inland or coastal, within the territorial limits or under the jurisdiction of the state. (§ 2 ch 63 SLA 1961; am §§ 2, 3 ch 60 SLA 1976)

ARKANSAS STATUTE:

21-234. LIABILITY OF OWNER OR LESSEE OR VESSEL FOR INJURY OR DAMAGE. The owner or lessee of a vessel shall be liable for any injury or damage occasioned by the negligent operation of such vessel, whether such negligence consists of a violation of the provisions of the statutes of this state, or neglecting to observe such ordinary care and such operation as the rules of the common law require. The owner shall not be liable, however, unless such vessel is being used with his or her express or implied consent. It shall be presumed that such vessel is being operated with the knowledge and consent of the owner, if at the time of the injury or damage, it is under the control of his or her spouse, father, mother, brother, sister, son, daughter, or other immediate member of the

owner's family. Nothing contained herein shall be construed to relieve any other person from any liability which he would otherwise have, but nothing contained herein shall be construed to authorize or permit any recovery in excess of injury or damage actually incurred. [Acts 1959, No. 453, § 14, p. 1794.]

ANNOTATED CALIFORNIA CODES:

Harbors and Navigation Appendix

§ 661. UNDOCUMENTED VESSEL OWNERS; LIABILITY FOR NEGLIGENCE

(a) Imputation of Negligence; Presumption of Consent to Use; Relief from Liability. Every owner of an undocumented vessel numbered under this code is liable and responsible for the death or injury to person or property resulting from negligence in the operation of such vessel, in the business of the owner or otherwise, by any person using and operating the same with the permission, express or implied, of the owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damage. It shall be presumed that such vessel is being operated with the knowledge and consent of the owner if at the time of the injury, death or damage it is under the control of his or her spouse, father, mother, brother, sister, son, daughter, or other immediate member of the owner's family. Nothing contained in this chapter shall be construed to relieve any person from any liability which he would otherwise have, but nothing contained in this chapter shall be construed to authorize or permit any recovery in excess of injury or damage actually incurred.

Code of GEORGIA Annotations:

17-611.2 [51-1-22] LIABILITY OF OWNER OF VESSEL FOR INJURY OR DAMAGE CAUSED BY NEGLIGENT OPERATION (Also incorporates 17-620)

The owner of a vessel shall be liable for any injury or damage occasioned by the negligent operation of the vessel, whether the negligence consists of a violation of the statutes of this state or of neglecting to observe such ordinary care in such operation as the rules of common law require. The owner shall not be liable, however, unless the vessel is being used with his or her express or implied consent. It shall be presumed that the vessel is being operated with the knowledge and consent of the owner if, at the time of the injury or damage, the vessel is under the control of his or her spouse, father, mother, brother, sister, son, daughter, or other immediate member of the owner's family. Nothing contained in this Code section shall be construed to relieve any other person from liability which he would otherwise have nor shall anything contained in this Code section be construed to authorize or permit any recovery in excess of injury or damage actually incurred.

(Acts 1968, pp. 487, 495; 1973, pp. 1427, 1442)

IDAHO Code:

67-7032. OWNER'S RESPONSIBILITY – PRESUMPTION OF CONSENT.

(1) The owner of the vessel shall be liable for any injury or damage occasioned by the negligent operation of it, whether the negligence consists of a violation of the

provisions of law, or in the failure to observe ordinary care in the operation as the rules of the road require. It shall be presumed a vessel is being operated with the knowledge and consent of the owner, if, at the time of the injury or damage, it is under the control of the owner's spouse, father, mother, brother, sister, son or daughter, or other immediate member of the family. The owner shall not otherwise be liable, however, unless the vessel is being used with his consent, either expressed or implied.

(2) Nothing contained herein shall be construed to relieve any other person from any liability which he would have otherwise had, but nothing contained herein shall be construed to authorize or permit any recovery in excess of injury or damage actually incurred.

(3) Nothing contained herein shall deprive the owner of any vessel of any of the rights, limitations or exemptions from liability afforded such owner under any federal statutes. [I.C., § 67-7032, as added by 1986, ch. 207, § 2, p. 515.]

West's, LOUISIANA Revised Statute:

§ 851.18 OWNER'S RESPONSIBILITY; PRESUMPTION OF OWNER'S CONSENT TO OPERATE.

A. The owner of a watercraft shall be liable for any injury or damage occasioned by the negligent operation of such watercraft whether such negligence consists of a violation of the provisions of the statutes of this state or in the failure to observe such ordinary care in such operation as the rules of the common law require.

B. The owner shall not be liable, however, unless such watercraft is being used with his or her express or implied consent. It shall be presumed that such watercraft is being operated with the knowledge and consent of the owner, if, at the time of the injury or damage, it is under the control of his or her husband, wife, father, mother, brother, sister, son, daughter, or other immediate member of the family.

MONTANA Code Annotated:

23-2-505. OWNER'S CIVIL LIABILITY. The owner of a vessel shall be liable for any injury or damage occasioned by the negligent operation of such vessel, whether such negligence consists of a violation of the provisions of the statutes of this state or neglecting to observe such ordinary care and such operation as the rules of the common law require. The owner shall not be liable, however, unless such vessel is being used with his or her express or implied consent. It shall be presumed that such vessel is being operated with the knowledge and consent of the owner if, at the time of the injury or damage, it is under the control of his or her spouse, father, mother, brother, sister, son, daughter, or other immediate member of the owner's family. Nothing contained herein shall be construed to relieve any other person from any liability which he would otherwise have, but nothing contained in this section shall be construed to authorize or permit any recovery in excess of injury or damage actually incurred.

Revised Statute of NEBRASKA:

37-1267. CIVIL LIABILITY OF OWNER; RECOVERY LIMITED TO ACTUAL DAMAGES.

The owner of a vessel shall be liable for any injury or damage occasioned by the negligent operation of such vessel, whether such negligence consists of a violation of the provisions of the statutes of this state or neglecting to observe such ordinary care and such operation as the rules of the common law require. The owner shall not be liable unless such vessel is being used with his or her express or implied consent. It shall be presumed that such vessel is being operated with the knowledge and consent of the owner, if at the time of the injury or damage, it is under the control of his or her spouse, father, mother, brother, sister, son, daughter, or other immediate member of the owner's family. Nothing contained in this section shall be construed to relieve any other person from any liability which he would otherwise have, but nothing contained in this section shall be construed to authorize or permit any recovery in excess of injury or damage actually incurred.

NEW MEXICO Statute:

66-22-17. OWNER'S CIVIL LIABILITY.

The owner of a vessel shall be liable for any injury or damage occasioned by the negligent operation of the vessel, whether the negligence consists of a violation of the provisions of the statutes of this state, or neglecting to observe the ordinary care and operation that the rules of the common law require. The owner shall not be liable

unless the vessel is being used with his express or implied consent. It shall be presumed that the vessel is being operated with the knowledge and consent of the owner, if at any time of the injury or damage, it is under the control of the spouse, father, mother, brother, sister, son, daughter, or other immediate member of the owner's family. Nothing contained herein shall be construed to relieve any other person from any liability which he would otherwise have, but nothing contained herein shall be construed to authorize or permit any recovery in excess of injury or damage actually incurred.

NORTH DAKOTA Code:

20.1-13-13. OWNER'S CIVIL LIABILITY.

The owner of a vessel shall be liable for any injury or damage occasioned by the negligent operation of such vessel, whether such negligence consists of a violation of state statutes, or neglecting to observe such ordinary care and such operation as the rules of the common law require. The owner shall not be liable, however, unless such vessel is being used with his or her express or implied consent. It shall be presumed that such vessel is being operated with the knowledge and consent of the owner, if at the time of the injury or damage it is under the control of his or her spouse, father, mother, brother, sister, son, daughter, or other immediate member of the owner's family. Nothing herein relieves any other person from any liability he would otherwise have, and nothing contained herein authorizes or permits any recovery in excess of injury or damage actually incurred.

RHODE ISLAND General Law:

46-22-15. OWNER'S CIVIL LIABILITY.

The owner of a vessel shall be liable for any injury or damage occasioned by the negligent operation of such vessel, whether such negligence consists of a violation of the provisions of the statutes of this state, or neglecting to observe such ordinary care and such operation as the rules of the common law require. The owner shall not be liable, however, unless such vessel is being used with his or her express or implied consent. It shall be presumed that such vessel is being operated with the knowledge and consent of the owner, if at the time of the injury or damage, it is under the control of his or her spouse, father, mother, brother, sister, son, daughter, or other immediate member of the owner's family. Nothing contained herein shall be construed to relieve any other person from liability which he would otherwise have, but nothing contained herein shall be construed to authorize or permit any recovery in excess of injury or damage actually incurred.

TENNEESSEE [Sic] Code:

69-10-215. LIABILITY OF OWNERS OR OPERATORS.

(a) The owner of a vessel, other than a bona fide person engaged in the business or renting boats, shall be liable for any injury or damage occasioned by the negligent operation of such vessel, whether such negligence consists of a violation of the provisions of the statutes of this state, or neglecting to observe such ordinary care and such operation as the rules of common law require.

(b) The owner shall not be liable, however, unless such vessel is being used with his or her express or implied consent. It shall be presumed that such vessel is being operated with the knowledge and consent of the owner, if at the time of the injury or damage, it is under the control of his or her spouse, father, mother, brother, sister, son, daughter, or other immediate member of the owner's family.

(c) Nothing contained herein shall be construed to relieve any other person from any liability which he would otherwise have, but nothing contained herein shall be construed to authorize or permit any recovery in excess of injury or damage actually incurred.

(d) This chapter shall not be construed to affect any rights accorded owners under the laws of the United States.

## APPENDIX S

### OTHER STATUTES EFFECTING OWNER LIABILITY FOR WATERCRAFT

IOWA Code Annotated:

106.18 OWNER'S CIVIL LIABILITY.

The owner and oeprator [sic] of any undocumented vessel shall be liable for any injury or damage occasioned by the negligent operation of such vessel.

PENNSYLVANIA Statute:

§ 5504. LIABILITY FOR DAMAGE CAUSED BY OPERATOR.

Every owner of a watercraft causing or knowingly permitting any person to operate the watercraft in, upon or through the waters of this Commonwealth, and any person who leases or furnishes a watercraft to any other person, shall be jointly and severally liable with the other person for damages arising out of any act or occurrence in the operation of the watercraft.

NEW YORK:

Every owner of a vessel used or operated upon the navigable waters of the state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vessel, in the business of such owner, or otherwise, by any person using or operating the same with the permission, express or implied, of such owner.